U.S. Department of Labor

Office of Administrative Law Judges
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CASE NOS.: 2003-LHC-105
2003-LHC-106
2003-LHC-107
2003-LHC-108

OWCP NOS.: 6-182378
6-176031
6-174287
6-171637

In the Matter of:

LAVERNE KUHLMANN
Claimant

v.

CROWLEY MARITIME CORP.
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.
Carrier

APPEARANCES:

Juan A. Sanchez, Esq.
For the Claimant

James W. McCready, Esq.
For the Employer

Before: DANIEL L. LELAND
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the Act"), as amended, 33 U.S.C. § 901 *et seq.*, and the implementing regulations, 20 C.F.R. Parts 701 and 702. A formal hearing was held in this case on April 1-2, 2003, in Fort Lauderdale, Florida. At the hearing, Claimant's exhibit 1 and Employer's exhibit 1

were admitted into evidence without objection.[1] Claimant and Employer submitted post-hearing briefs.[2] This decision is being rendered after having given full consideration to the entire record.

STIPULATIONS

At the hearing, Claimant and Employer stipulated that:

1. The Act applies to this claim.

2. An employer/employee relationship existed at the time of each alleged date of accident.

3. Claimant gave notice of the April 6, 1995 [left shoulder injury] incident on April 7, 1995.

4. Employer filed an LS-202 on or about April 19, 1995 with respect to the incident of April 6, 1995.

5. Claimant's average weekly wage for the April 6, 1995 incident was $944.65 with a corresponding compensation rate of $629.80.

6. Temporary Total Disability Benefits with respect to the April 6, 1995 incident were paid from April 7, 1995 through December 4, 1995, for a total of 33 4/7 weeks for a total of $18,263.33.

7. Claimant filed a request for a change of physician on or about June 17, 1997 for the April 6, 1995 incident.

8. Employer/Carrier filed correspondence on or about June 30, 1997 controverting Claimant's right to a Change of Physicians.

[1] The following abbreviations have been used in this decision and order: CX = Claimant's exhibit, EX = Employer's exhibit, TR = transcript of hearing. Claimant submitted one volume of evidence which contains two "tabs" of information and Employer submitted seven volumes of evidence which contain numerous "tabs" of information. In order to abbreviate the references to the parties' evidence, these additional abbreviations have been used in this decision and order: V= Volume, T= Tab.

[2] On August 20, 2003, Claimant submitted Claimant's Rebuttal and on August 29, 2003, Employer submitted Employer/Carrier's Reply Brief. When setting the briefing schedule, I made no allowance for rebuttal briefs and neither party filed a Motion requesting the opportunity to submit rebuttal briefs. Therefore, Claimant's Rebuttal and Employer/Carrier's Reply Brief are stricken from the record.

9. Claimant's treating physician, Dr. Bernard Miot, opined that Claimant reached maximum medical improvement with respect to the April 6, 1995 incident on August 7, 1996, with a zero impairment rating.

10. Claimant gave notice of the October 31, 1996 [right] thumb injury on the day of the incident.

11. Employer filed an LS-202 for the October 31, 1996 incident on or about November 1, 1996.

12. Claimant's average weekly wage for the October 31, 1996 incident was $743.78 with a corresponding compensation rate of $495.85.

13. Claimant filed an LS-203 on or about August 12, 1997 for the October 31, 1996 incident.

14. Employer/Carrier paid Temporary Total Disability Benefits from November 1, 1996 through October 7, 1997 for a total of 48 weeks and 4 days in the amount of $24,084.14. Claimant underwent a surgical procedure to the right thumb and Temporary Total Disability Benefits were reinstated as of February 16, 1998 and paid through March 22, 1998 for 5 weeks in the amount of $2,479.25 resulting in an overpayment of Temporary Total Disability Benefits of 3 days as Claimant was released to return to work as of March 19, 1998 and in fact returned to work on March 20, 1998.

15. Employer/Carrier voluntarily paid a scheduled injury to the Claimant's right thumb of 7% equating to 5.25 weeks for a total of $2,603.21 as of October 29, 1997. Employer/Carrier voluntarily paid an additional 23% impairment to the right thumb on or before May 27, 1998, equating to 22.5 weeks in the amount of $11,156.62. Total impairment benefits paid relating to this claim were $37,720.01.

16. Claimant gave notice of the May 1, 1998 right shoulder [injury] incident on May 2, 1998.

17. Employer filed an LS-202 for the incident of May 1, 1998 on May 4, 1998.

18. Claimant's average weekly wage for the May 1, 1998 incident was $1,055.33 with a corresponding compensation rate of $703.55.

19. Employer/Carrier initially paid Temporary Total Disability Benefits for the May 1, 1998 incident from May 2, 1998 through November 9, 1998 at a rate of $703.55 per week for a total of 27 weeks and 3 days in the amount of $19,297.37. Employer/Carrier paid Temporary Partial Disability Benefits between November 10, 1998 and April 12, 1999 in various amounts while Claimant worked for

Employer in the Early Return to Work Program[3] for a total of 22 weeks in the amount of $7,251.10. Employer/Carrier paid Permanent Partial Disability Benefits from April 13, 1999 through May 22, 2000 in the amount of $703.55 per week for a total of 58 weeks in the amount of $40,805.90. Employer/Carrier then paid Temporary Partial Disability Benefits from May 23, 2000 through May 20, 2002 at the rate of $703.55 for a total of 104 weeks in the amount of $73,169.20. Employer then began paying Claimant Permanent Partial Disability Benefits on May 21, 2002 at the rate of $410.22 per week up to the present and continuing.

20. Dr. Kevin Kessler opined that Claimant was at maximum medical improvement with respect to the May 1, 1998 right shoulder injury as of February 26, 1999.

21. Claimant allegedly filed a Claim for Benefits relating to the May 1, 1998 incident on January 11, 2000. The Claim was received by Employer/Carrier on February 16, 2000.

22. Employer/Carrier filed an LS-207 with respect to the May 1, 1998 incident on March 22, 2000.

23. Claimant allegedly filed a document titled "Claim for Benefits" on January 11, 2000, seeking benefits for an alleged severe back injury occurring in the course and scope of Claimant's employment on July 1, 1999.

24. Employer/Carrier filed an LS-202 regarding the alleged claim of July 1, 1999 on May 2, 2000, upon receiving notice of the alleged incident.

25. Employer/Carrier filed an LS-207 on June 6, 2000 controverting all indemnity and medical benefits relating to the alleged July 1, 1999 claim.

26. Employer/Carrier has not paid any indemnity or medical benefits related to the alleged July 1, 1999 back injury.

(TR 5-6; *Employer/Carrier's Fourth Amended Pre-Hearing Statement*, pp. 2-6).

ISSUES

1. Whether Claimant's alleged back injury is a compensable work-related injury?

2. If so, whether Claimant gave timely notice of the back injury to Employer pursuant to § 912 of the Act?

3. If so, whether Claimant timely filed the claim pursuant to § 913 of the Act?

4. If so, whether the claim is barred by § 933(g) of the Act?

[3] Claimant disputes that he was in the Early Return to Work Program. (TR 36).

5. If so, whether Claimant is entitled to reimbursement for his medical expenses pursuant to § 907 of the Act?

6. If so, whether Claimant is entitled to temporary total disability benefits from April 13, 1999 [sic] forward?

7. Whether Claimant's alleged psychiatric condition is a compensable work-related injury?

8. Whether Claimant is totally and permanently disabled as a result of his work-related injuries?

9. Whether Claimant retains a wage-earning capacity?

10. Whether Employer/Carrier is entitled to a credit for temporary total disability benefits paid from May 23, 2000 through May 20, 2002?

11. Whether Claimant is entitled to penalties, interest, and attorney's fees?

12. Whether Employer/Carrier is entitled to Section 8(f) relief?

SUMMARY OF EVIDENCE

Hearing Testimony

Laverne Kuhlmann's Testimony

Background

Laverne Kuhlmann ("Claimant") was born on March 18, 1961 in upstate New York. (TR 155, 316). Claimant's parents divorced when he was three years old, and his mother moved to Pennsylvania when he was fifteen or sixteen years old. (TR 232-233). Claimant completed the ninth grade, and then he began working on a farm to support himself and his sister after his mother left. (TR 155, 157, 233). Claimant eventually earned his general equivalency diploma ("G.E.D.") so that he could attend welding school. (TR 157). Claimant went through twenty-six weeks of welding training at Private Industry Council, but he did not become certified in welding. (TR 157-158).

Claimant worked on farms until 1984, when he moved to Florida and began working for Hoover Irrigation. (TR 158). Claimant initially worked on the trenching machines, but then he became a pipe welder. (TR 158-159). Claimant testified that he was a stick welder, which "is the heaviest welding that you do," because the welding cables weigh forty-five to fifty pounds. (TR 159). Hoover Irrigation eventually purchased a wire feed welder, which is a lighter form of welding, when Claimant was working on the pump stations. *Id*. At one point, Claimant was the foreman for the installation of the main pipeline for watering the parking lot at Joe Robbie Stadium. (TR 234). Claimant was responsible for reading blueprints to determine where valves

go on the pipeline, contacting the surveyor to determine the precise location of the pipeline, and keeping track of the employee's work hours. (TR 236-237). Claimant only worked for three months as the foreman before he was fired because he did not get along with the crew. (TR 235). Claimant worked for Hoover Irrigation for about five years. (TR 160).

After his employment with Hoover Irrigation, Claimant began working for Industrial Models Incorporated, where he built plastic and wooden concept and design models for IBM. (TR 160-161). Claimant worked there as a welder for about two and one-half to three years. (TR 161). Claimant was laid off from Industrial Models Incorporated when IBM moved their design and research to North Carolina. (TR 241-242). Claimant also testified that he was laid off because he did not get along with the boss's son. (TR 242). After that, Claimant opened his own business, called Bootleg Trailer Inc., where he welded car trailers and performed other types of welding. (TR 161-162, 165). Claimant then worked for International Warehouse Services for six or seven months as a warehouse laborer. (TR 163). Claimant and the owner of International Warehouse Services, Fred Rogacki, had a race car that they would take out on Saturday nights. *Id*. Claimant was the only mechanic on the race car, and the "crew" was made up of Fred Rogacki's employees. (TR 243). Claimant testified that this was only a hobby, and that it was not part of his job at International Warehouse Services.[4] (TR 163). Fred Rogacki introduced Claimant to Joe O'Shea, who eventually got him a job at Crowley American Transport, Inc. ("Crowley" or "Employer"). (TR 162-163).

Claimant's Employment and Injuries with Crowley

In June of 1994, Claimant began working for Crowley as a trailer mechanic.[5] (TR 165, 167). Claimant testified that a trailer mechanic works on "nothing with a motor and anything that gets drug around... behind a truck." (TR 167). Claimant's work ranged from replacing panels on the trailers to repairing the brakes. (TR 167-168). Claimant testified that the job was strenuous because it involved a lot of bending and lifting, and that the trailer parts were heavy; for example, the landing gears weighed around one hundred to one hundred and fifty pounds and the rear wheels weighed over three hundred pounds. (TR 169). Further, Claimant testified that the shop did not have any ladders for the five years that he was there, which meant that the mechanics had to climb up and jump out of the trailers, which were approximately five to five and one-half feet high, up to one hundred times per day. (TR 170, 249).[6] Claimant also testified

[4] Claimant testified that he dissolved the race car team in 1996 due to his injuries, his inability to work on the cars, and problems that he had with the crew. (TR 245-246).

[5] Claimant testified that he filled out the pre-employment application after he started working for Crowley, and pre-dated it per the instructions of Joe O'Shea. (TR 301). He also testified that Mr. O'Shea told him to "keep it as simple as possible" and that he was hurried when he filled out the application. (TR 303, 305).

[6] Claimant testified during cross-examination that there were ladders for the mechanics, but that they were "rickety," they were meant to climb up on top of the trailers, and "they had a big railing up the side and you can't push it up to the back of a truck and turn it sideways because then you've got this big railing to climb over." (TR 249).

that the mechanics did not have any respirators to wear when they were welding inside the trailers, and so they inhaled fumes from the painted, treated metals. (TR 171). Claimant stated that the trailer mechanics "always had a ton of work, but I always made it a point to be the best one in the shop." (TR 168).

On April 6, 1995, Claimant injured his left shoulder. (TR 171). Claimant testified that it was raining, and he was climbing out of a trailer when his foot slipped off of the bumper and he caught himself with his left arm and felt a tear. (TR 172). Dr. Miot performed surgery on his shoulder, but he continued to have problems, and Dr. Kessler performed a second surgery. (TR 172-173). Claimant testified that he asked Dr. Miot to release him to full-duty work, even though he still had problems with his left shoulder, and that he compensated by doing most things with his right arm. (TR 174).

On October 31, 1996, Claimant broke his right thumb. (TR 175). Claimant was in the yard assisting another worker, named Jose, load a flat rack onto a ship. Jose released his side of the rack to get inside of the trailer and his right thumb broke backwards. (TR 175-176). Claimant thought his thumb was just dislocated, so he "pulled it out hard and put it back into shape" and then went to the medical center. (TR 176). Dr. McAuliffe removed the joint from his thumb and replaced it with pins, but after the surgery he was having problems bending the top part of his thumb, so he went to Dr. Eastlick. (TR 177). Dr. Eastlick performed a second surgery on Claimant's thumb to remove the hardware, and now he can bend the top part of his thumb. *Id*. Claimant returned to full-duty work after the thumb surgery, but he testified that he dropped a lot of things because of his right thumb. (TR 178-179).

On May 1, 1998, Claimant injured his right shoulder when he was closing the door of a shipping container. (TR 179). Claimant testified that the pain was the same type that he had with the left shoulder, and so he felt it was the same type of injury. *Id*. Claimant went to Dr. Miot, who told him that it was the same type of injury and that he needed surgery on his right shoulder. (TR 180). Claimant stated that physical therapy bothered his shoulder and that he was having problems with both of his shoulders, so he decided to get a second medical opinion from Dr. Kessler. *Id*. Dr. Kessler told Claimant that Dr. Miot "did not address the problem, he just addressed the symptoms." (TR 181).

Eventually, Claimant returned to light-duty work at Crowley. *Id*. Claimant testified that he was only supposed to replace light bulbs and lenses, but in fact he was pulling seven way cable underneath trailers, welding bumpers onto trailers, and servicing trailers in the yard on the mobile service unit ("MSU"). (TR 182). Claimant testified that he had to drive an old delivery truck with no power steering, no power brakes, a manual transmission, and a driver's seat with no padding. (TR 182-183). Claimant tried to get another assignment, but he was told by his supervisor, Al Leyva, that refusal to drive was insubordination and grounds for immediate termination. (TR 183). Claimant saw Dr. Kessler one and one-half days later, was scheduled for surgery, and has not physically worked for Crowley since April of 1999. (TR 183, 185). However, Claimant testified that he is still on Crowley's roster, and thus still considers himself its employee. (TR 185). Claimant testified that once he has surgery on his back and shoulders, he wants to go back to Crowley because "that's the best job I ever had, financially." (TR 253). Claimant is interested in working as an inspector for Crowley because it is "a lot easier to do"

and he "worked on trailers and I knew them inside and out, [and] I figured what better of a job could there be than to inspect them."[7] *Id*. In fact, Claimant worked for a few days as a pre-trip inspector when he was in the MSU. (TR 253-254).

Claimant's History of Back Problems and His Current Back Condition

Claimant jumped off a roof when he was fourteen years old, but he stated that he did not experience any back pain. (TR 268). Claimant does not recall being in an automobile accident in October of 1998 [sic] and thereafter complaining of low back pain and pain in his left leg.[8] *Id*. In January of 1993, Claimant had a slight bulge or herniation in his back, which Dr. Purita repaired. (TR 187, 271). Claimant does not recall telling the doctor that he had low back pain for three to four years. (TR 269). He testified that his back was better after that surgery, and that he even rode his motorcycle to have the stitches removed one and a half weeks later. (TR 187). In July of 1997, Claimant stepped in a hole near his house and twisted his knee.[9] (TR 188). Dr. Linn performed surgery on his knee. (TR 187). Claimant had a burning pain from his leg to the bottom of his foot, but Dr. Linn told him his back was not the source of the pain. (TR 188). Dr. Linn did tell Claimant that there was a very small bulge in his back, but that it was inoperable and the only way to treat it was with epidurals. (TR 281). Claimant also testified that a few days after he returned to work from his leave for his thumb surgery,[10] he stood up under a trailer, hit his spine, and felt a pain in his testicles. (TR 188-189). He filled out an accident report, went to see Dr. Purita, and Dr. Purita gave him an epidural. (TR 189). Claimant did not tell Dr. Purita that his back pain was due to a work-related injury because he was afraid that Dr. Purita would not treat him. (TR 286). Claimant also talked to Bill Kinane[11] that day or the next day about seeing a physician for his back pain, but he was denied. (TR 201). Claimant believes that someone from Crowley removed both the accident report and his daily log from his file because he reported injuring his back. (TR 193-194). Further, Claimant testified that while this was the only back accident which he reported, he repeatedly injured his back when he fell out of trailers and hit his back on the underneath of trailers. (TR 196, 248). Claimant testified that from October 1997 to April 1998 he was on light-duty work, yet he had to drive a truck without power steering, crawl and drag seven-way cables under trailers, weld bumpers, fabricate signs for the yard, and carry and cut steel. (TR 195-196). Claimant testified that his work while on light-duty

[7] Claimant testified that in order to get an inspector position he would have to bid on it through the union. (TR 254).

[8] The hospital records indicate that Claimant was involved in an automobile accident on October 24, 1988. (EX 1, V1, T2).

[9] Claimant sued Cooper City regarding his injuries from the fall, which was settled out of court. (TR 277). Claimant testified that it was his attorney's idea to include his back pain as part of the lawsuit. (TR 277-278).

[10] Claimant returned to work on October 7, 1997. (TR 192).

[11] Bill Kinane is a claims adjuster for Employer. (*See* Letter to Claimant from Mr. Kinane dated May 25, 2000).

was the same as his normal full-duty work, and that all of these activities aggravated his back. (TR 196).

Claimant does not recall going to Stranger Health Care Centers on January 31, 1998, complaining that the day before he was riding his motorcycle when he bent over, coughed and felt a pain in his back. (TR 292-293).

In November of 1999, after Claimant stopped working for Crowley, he saw Dr. Cantor regarding his back pain. (TR 197). Claimant testified that when he wrote that he injured himself "moving stuff in garage" on the questionnaire for Dr. Cantor, that he was referring to Crowley's shop. He testified that "shop" and "garage" referred to the same thing. (TR 289, 291). Dr. Cantor, after reviewing an x-ray, informed Claimant that he needed back surgery. On the second visit, Dr. Cantor told Claimant that "people that work with their bodies are the people that get these types of injuries." (TR 200).[12] Dr. Cantor operated on Claimant's back twice. (TR 202). Claimant continued to have pain in his left buttocks, testicles, leg, and foot, and so he went to see a neurologist. (TR 203). Dr. Alan Teman diagnosed Claimant with failed back syndrome and referred him to Dr. Ilene [sic] Estores for treatment. *Id*. Claimant is currently undergoing physical rehabilitation. *Id*. Claimant also testified that he takes the following medications: Neurontin and Topomax for the nerve damage in his back, Vicodin for the pain in his leg, testicles, and abdomen, and Wellbutrin for depression. (TR 156). Regarding his current condition, Claimant testified that "I do yard work all the time. I clean my swimming pool. I change the oil in my car. I mean, I do stuff. I don't lay in bed all day." (TR 288).

Labor Market Surveys

The November 18, 2001 labor market survey contains a job position with With Community Services. (TR 223). Claimant tried to get their telephone number to get directions, but he could not find it. (TR 218, 223). Further, he testified that Miami is about forty miles from his house. (TR 223-224). Claimant contacted Friendly Ford and was told that they wanted someone with service writer experience. (TR 225). Claimant contacted Prezant Iron Works about a welding position, which he would have really enjoyed, but was told that the position required lifting in excess of one hundred pounds. (TR 227). Claimant testified that if he could do that job, then he could go back to welding trailers for Crowley. (TR 228). Claimant did not contact any of the employers regarding the unarmed security positions because he contacted the licensing bureau in Tallahassee and was told that with his criminal history (six DUIs and assault charges) he could not get licensed.[13] (TR 226, 266). Claimant also testified that he could not protect himself and asked "what kind of a security [guard] am I going to be?" (TR 267). Claimant did not contact Motor City regarding the service writer position because "I'm not

[12] When asked if Claimant had received a medical opinion that linked his work activities to his progressing back pain before Dr. Cantor, he began to testify: "Dr. Purita told me I should find something else to do besides being a - -." (TR 197).

[13] The only evidence of Claimant's criminal history in the record is evidence that adjudication of guilt on a cocaine possession charge was withheld on April 22, 1986. (EX 1, V7, T6, pp. 27-28).

qualified for those jobs and I'm not going to just keep going and getting shot down and shot down and shot down, over and over and over again." (TR 228).

Claimant testified that he contacted Mr. Bilski after he received the first labor market survey and informed him that the education, employment, and the medical histories were wrong, but Mr. Bilski did not correct this on the later surveys. (TR 206). Also, Claimant testified that Mr. Bilski knew that he had physical therapy on Thursdays, yet every time Mr. Bilski scheduled interviews it was always on Thursdays. (TR 208). Claimant testified that Mr. Bilski only talked to him on the telephone once, and would not talk to him thereafter. (TR 206). Claimant testified that Mr. Bilski sent him a letter on March 4, 2003, in which he had scheduled several interviews for Claimant on March 6, 2003, but he did not even receive the letter until March 6, 2003. Claimant testified that when he called potential employers, he was told that they had not spoken to Mr. Bilski and they did not know about his medical conditions or the medications that he was taking. (TR 207-208).

Claimant testified about the problems with the May 12, 2002 labor market survey. First, Claimant stated that he did offer to meet with Mr. Bilski, even though the survey says that he refused. (TR 209). Second, the medical information is inaccurate because the survey does not mention his right shoulder injury, his thirty percent disability in his right thumb, the medications that he is taking, his therapy, or his twenty-five pound weight restriction. (TR 210-211). Third, he testified that the survey does not include any telephone numbers, and when he was able to get into contact with the employers, none of them had spoken to Mr. Bilski. (TR 211).

Claimant testified that when he contacted the employers in the May 12, 2002 labor market survey, he was not qualified for the jobs. Claimant contacted several car dealerships about a service writer position, and was told that he needed service writer or sales experience, neither of which he had. (TR 212). Claimant contacted Coca-Cola Bottling about the fleet supervisor position, but gleaned from the automated message that he was not qualified because the position required two or three years of supervisory experience and a chauffeur's license, neither of which he had. (TR 213). Claimant contacted Bo-Air and spoke with the owner, but was told that he was not qualified because he did not have any sewing machine experience. (TR 214). Claimant also met with Ms. Webb from ACR Electronics, and was told that there was no position available and gave him a letter to that effect. (TR 214-215). He also contacted Tri-County Truck and Equipment, and was told that he was inexperienced. (TR 217). Claimant contacted TJ Maxx, Deerfield and was told that "they wanted a happy, smiling face around there to take care of customers. I said, you don't want a wounded Teamster and he said no." (TR 218). He contacted Skin Tech, Copyco Incorporated, Book Liquidators, but he was told that they wanted someone with sales experience. (TR 218-220). When Claimant contacted Eagle Venture Capital, he was told to come in and fill out an application for a telephone sales position, but he did not because when "I told him I was taking some pills from a psychiatrist he says, oh, throw that shit in the garbage. You need to smoke some joints." (TR 220). Claimant contacted Burmex, and told Richard Lorenzo, the person he spoke to, about his shoulder problems, and he was told that the position required removing water meter plates that weighed up to fifty pounds and getting down on his hands and knees to uncover some of the meters. (TR 221-222, 262). Claimant was also upset because the labor market survey stated the position with Burmex was for nine dollars an hour, but Mr. Lorenzo told him the position paid seven dollars an hour. (TR

221, 261). He did not contact L & L Supply because he could not find its telephone number. (TR 218). Claimant testified that none of the employers in the May 12, 2002 labor market survey offered him a job. (TR 217). Claimant testified that subsequent to the May 12, 2002 labor market survey, Employer started deducting $300 per week from his check. (TR 222).

Claimant did not contact Dolphin Fence about the welding position in the February 4, 2003 labor market survey because it was repetitive work and he did not think he could perform that kind of work. Also, he testified that he would go back to Crowley if he could do that type of physical work. (TR 267). Claimant does not recall contacting USAMC about a paper cutter position from the February 6 and 8, 2003 letters. (TR 260). Claimant did not contact Dayton Granger about the primer position in the February 6 and 8, 2003 letters because he did not want to be a painter, the smell of paint makes him nauseous, and painting is repetitive work. (TR 264). Claimant testified that he "stopped paying attention" to the most recent labor market surveys because they arrived late and he thought it was a form of harassment. (TR 261).

Claimant testified that when he contacted the employers on the labor market surveys and was repeatedly turned down, that he was "convinced how worthless I really am." (TR 229). During the hearing, Claimant expressed his frustration that Mr. Bilski set up interviews with potential employers without his knowledge, especially when they were at the same time as his physical therapy.[14] (TR 259). Also, Claimant testified that when his benefits were cut, he could not afford his hobbies and he could not help as much with the bills around the house. (TR 229). Claimant testified that he asked some friends with small businesses if they had any part-time work, but other than that he has not looked for employment outside of the labor market surveys. (TR 251-252). Claimant testified that he is not willing to lie in order to get a job or money to feed his family. (TR 263, 300). However, he also testified that he would lie "if it meant the difference between my family being taken care of or not. I don't know how far I would go. It depends on the situation, I guess. Right about now I would do about anything to get back to work." (TR 299).

Julie Kuhlmann's Testimony

Julie Kuhlmann is Claimant's wife, and they have been married since May 20, 1989. (TR 323, 339). Mrs. Kuhlmann testified that Claimant enjoyed working for Crowley because it was a good job with good benefits. (TR 325-326). Mrs. Kuhlmann testified that after Claimant injured his left shoulder, "he couldn't do anything. I had two young kids. He couldn't even hold them. He couldn't pick them up. He couldn't go anything." (TR 327). Mrs. Kuhlmann was concerned about Claimant returning to work after his right thumb injury, but he returned because he liked working for Crowley. (TR 328). After Claimant's left shoulder injury, she testified that he "went downhill" because he could not help with the bills or the children, and Claimant got depressed because he could not work. (TR 329). Claimant has not worked since he left Crowley in 1999. (TR 330). Also, Claimant does not do a lot of work around the house other than pick up the children from school. (TR 330). Mrs. Kuhlmann testified that Claimant complained of back pain (beginning between his shoulders and radiating down his back) while he was working for Crowley, and he could not do anything when he returned home. (TR 332). Mrs. Kuhlmann describes Claimant's pain as a nine out of ten, and that lifting even ten pounds, bending down,

[14] Claimant has aquatic therapy every Thursday in Miami. (TR 208).

walking or sitting for long periods of time, or standing aggravates his pain. (TR 336). She also testified that Claimant "blows up" at her and the children all the time. (TR 337).

Mrs. Kuhlmann testified that Claimant would "just go off" when he received a labor market survey from Mr. Bilski because they would arrive late, the jobs would be far away, and he was not qualified for them. (TR 334). Claimant would be in "a bad mood" the rest of the evening after he received a labor market survey. *Id*. Mrs. Kuhlmann also testified that she saw Claimant try to contact potential employers from the labor market surveys on her days off. (TR 334, 348).

Mrs. Kuhlmann testified that last July Claimant, herself, and her children drove straight from southern Florida to Boston, Massachusetts, only stopping for gasoline. (TR 339-340). Then, Claimant drove straight from Maine to south Florida, which took thirty-three hours, and that he was "heavily medicated." (TR 340).

James Poling's Testimony

James Poling is an employee of Crowley and a friend of Claimant. (TR 349). Mr. Poling started working for Crowley in February of 1988, and began working as a trailer mechanic in September of 1988. (TR 350). Mr. Poling has been a truck inspector since 2001.[15] (TR 350, 376).

Mr. Poling testified that the trailer mechanic position is a heavy and skilled position because landing gears weigh between one hundred and one hundred and fifty pounds, the trailer wheels weigh three hundred and fifty to four hundred pounds, and repairing brakes is heavy work. (TR 351). He testified that the trailer mechanics need to know how to repair every part of the trailer. (TR 352-353). The trailer mechanic position also requires welding skills because containers need to be repaired when they get damaged during loading and unloading. (TR 351-352). Mr. Poling testified that the trailer mechanics were not provided respirators when they had to weld within a trailer. (TR 353). Mr. Poling testified that the trailer mechanic position requires a lot of bending, stooping, kneeling, and squatting. (TR 357).

Mr. Poling testified that the shop had "junk ladders" and that "if you could find a ladder, you could use it," but generally the trailer mechanics just climbed into the trailers via the bumper and then jumped out to leave. (TR 354-355). He testified that jumping out of the trailers was the preferred method for leaving the trailers, which were four to five foot off of the ground. (TR 355). Mr. Poling testified that the trailer mechanics in the speed lane[16] would jump out of the

[15] Mr. Poling testified that he bid on the truck inspector position twice. (TR 368). He did not get the inspector position the first time because he was beat out by someone with more seniority, but he did get the position the second time based on his seniority. (TR 368, 376). Mr. Poling also testified that he got the position the second time because he threatened to sue Crowley for discrimination. (TR 368-369).

[16] The speed lane is a service lane for the trailers that are going out of the yard. Simple repairs, such as sweeping, changing tires, and replacing lights, are made in the speed lane. (TR 355).

trailers between fifty and one hundred times a day, depending on how busy they were. (TR 357). Mr. Poling testified that Crowley eventually purchased new ladders for the shop, but he does not know when, probably in 1999. (TR 357-358).

Mr. Poling stated that people have returned to work via an early return to work program, but as of the last contract with the union that program does not exist. (TR 366, 381). Mr. Poling does not know how the early return to work program works because it is different for different people. (TR 371). Mr. Poling testified that most of the time that Claimant was on light-duty, it turned into full-duty work because he would have to repair bumpers, assist other trailer mechanics with brake and landing gear repairs. (TR 360). In fact, at one point Claimant assisted Mr. Poling in welding bumpers, gathering metal, and building signs while on light-duty work. (TR 380). Mr. Poling testified that none of this work was "light-duty." *Id*. He also testified that Crowley has opened up positions, outside of the bidding process, in order for injured employees to return to work. (TR 373).

Mr. Poling testified that MSU is a service truck that is used to repair trailers in the yard. (TR 361). He testified that most of them have power steering and some of them are automatic transmission. *Id*.

Alfredo Leyva's Testimony

Alfredo Leyva is a maintenance supervisor for Crowley. (TR 384). Mr. Leyva supervises the mechanics in the trailer, container and chassis departments. *Id*. He has worked for Crowley for sixteen years. *Id*. He is responsible for conducting safety meetings, ensuring OSHA compliance, and performing safety audits. (TR 384-385). Mr. Leyva testified that it is protocol for the trailer mechanics to go to him to report an injury. (TR 385-386).

Mr. Leyva testified that part of his job is to purchase ladders. (TR 387). He testified that the ladders in the shop are from six feet to thirteen feet tall. *Id*. He also testified that there were ladders available in the shop between 1994 and 1999. *Id*. Mr. Leyva testified that the truck mechanics often climb in and out of trailers without ladders, but that they "choose to" do that. (TR 389).

Mr. Leyva testified that the speed lane is officially called the "roadability service lane." (TR 387). The purpose of this lane is to perform a final check of trailers before they are sent out on the highway. (TR 387-388). The maintenance performed in that lane is to last fifteen to twenty minutes. (TR 388). Mr. Leyva also testified that sixty-five to seventy percent of the trailers in the speed lane are full, which means their doors are not opened. (TR 390). He testified that about forty trailers go through the speed lane during an eight-hour shift. (TR 390-391). Two trailer mechanics worked in the speed lane in 1997, but now one mechanic and one helper work in the speed lane. (TR 391).

Leslie Delman's Testimony

Leslie Delman is a certified rehabilitation counselor and certified vocational evaluator. (TR 392). Ms. Delman interviewed Claimant on February 28, 2003. (TR 394). Ms. Delman's

assessment of Claimant included an interview, review of medical records, vocational testing, and a transferable skills analysis. (TR 394-395). Ms. Delman's information regarding Claimant's educational background, work history, and criminal background came solely from her interview with Claimant. (TR 410). Ms. Delman reviewed medical records from Drs. Miot, Feanny, Eastlick, Kessler, Cantor, and Schwarz. (TR 406-407). She also reviewed Claimant's physical therapy records, the depositions of Drs. Kessler, Cantor, and Schwarz, and the labor market surveys prepared by Mr. Bilski and Mr. Larson. (TR 407). On the date of the hearing, she reviewed Dr. Reitman's medical evaluation. *Id*. She did not review Dr. Milowe's report, the two depositions of Claimant, the deposition of Dr. McAuliffe, or Claimant's work records. (TR 409).

Ms. Delman classified the trailer mechanic position as a heavy, skilled job, according to the Dictionary of Occupational Titles. (TR 395). Ms. Delman noted that the trailer mechanic position is a very physical job and that it includes a lot of crawling, pulling, pushing, climbing, and working overhead. (TR 396). Ms. Delman concluded that, based on the medical records she reviewed, Claimant cannot return to his previous job as a trailer mechanic. *Id*.

Ms. Delman performed several tests on Claimant. Although he has a ninth grade education and obtained his G.E.D., Claimant's math and reading skills are below the sixth grade level. (TR 397). Also, Claimant's intelligence test results were low-average and his finger dexterity was poor. *Id*. On cross-examination, Ms. Delman acknowledged that the finger dexterity test was dependent on the motivation of the individual and that the test was "really a test for someone who was an assembly worker working on small parts," not a test for "gross and manual dexterity using tools." (TR 409-410). Ms. Delman found no job matches in the transferable skills analysis. (TR 397). Ms. Delman concluded that Claimant cannot work uninterruptedly[17] in any capacity in gainful employment. (TR 398). Ms. Delman included both Claimant's back and psychiatric restrictions in this opinion. However, she would come to the same conclusion even without these restrictions. (TR 413-414). Further, she concluded that Claimant does not presently have any wage-earning capacity. (TR 398).

Ms. Delman offered several criticisms of the labor market surveys prepared by Mr. Bilski. First, the surveys inaccurately reported Claimant's education and assumed that he had computer skills, which he did not. (TR 399). Second, the surveys did not take into account Claimant's back and psychiatric limitations according to Drs. Cantor and Schwarz. *Id*. Third, the surveys did not take into account Claimant's criminal history. *Id*. Fourth, the surveys did not take into consideration Claimant's transferable skills. *Id*. Fifth, some of the jobs in the surveys were not within the sedentary or light-work capacity, such as the welder positions. (TR 400). Sixth, some of the jobs were not within twenty-five miles of Claimant's residence.[18] *Id*. Seventh, Ms. Delman did a sampling of the service writer positions, and found that Claimant needed prior experience as a service writer and computer skills, neither of which Claimant had,

[17] "Uninterruptedly" means being able to work all day, every day, without having to leave work early or take a few days off. (TR 398).

[18] Ms. Delman acknowledged that the jobs in Ft. Lauderdale and Boca Raton are within twenty-five miles of Claimant's residence. (TR 412).

and thus was not qualified for those positions. (TR 401). Finally, Ms. Delman did an Internet search for With Community Services, for which Claimant had a start date, and found that it was not even located at 12833 S.W. 42nd Street, but rather it was located two blocks away with a different address. (TR 402). Ms. Delman testified that she felt that Mr. Bilski's labor market surveys did not meet the professional standards for a vocational assessment because they did not provide a good faith job search to Claimant. (TR 404-405). Further, Ms. Delman testified that she would not send an individual to a job if he did not meet the minimum qualifications. (TR 405).

Thomas Bilski's Testimony

Thomas Bilski is a certified vocational evaluator and a certified disabilities management specialist. (TR 89, 145). Mr. Bilski explained that his job is to conduct a vocational assessment, which includes gathering the individual's educational, medical, vocational, and financial backgrounds, discussing with the individual his or her subjective limitations and then, if possible, producing a report regarding re-employment. (TR 78-79). In preparing labor market surveys for Claimant, Mr. Bilski reviewed Claimant's November 2000 and February 2003 depositions, medical records from Drs. Miot, Feanny, McAuliffe, Schecter, Eastlick, and Kessler, the depositions of Drs. McAuliffe, Kessler, Schwarz and Cantor, records from Sunshine Medical Center and Health South Rehabilitation, and Drs. Reitman and Milowe's medical reports. (TR 115-116). He also referred to the Dictionary of Occupational Titles. (TR 117). Mr. Bilski did not perform a face-to-face vocational assessment of Claimant. (TR 87). He tried to meet with Claimant, but neither Claimant nor his counsel appeared. (TR 88-89). Mr. Bilski is not qualified to conduct vocational testing. (TR 89).

Mr. Bilski was aware of Claimant's work history, and recited a history very similar to the one given by Claimant at the hearing. (TR 63-64). Mr. Bilski described Claimant's work history as "diversified" because his skills include blueprinting and mechanics. (TR 64-65). Mr. Bilski testified that he believed Claimant had graduated from high school when he prepared the November 18, 2001 labor market survey, but now he understands from Claimant's deposition testimony that he only completed the ninth grade and later earned his G.E.D. (TR 65). Mr. Bilski has also spoken with Claimant on the telephone, and believes that his communication skills are "excellent." (TR 130). Mr. Bilski did not include Dr. Cantor's opinion regarding Claimant's back limitations when preparing the labor market surveys because he was only instructed to consider Claimant's left shoulder, right shoulder, and right thumb injuries. (TR 71). However, he testified that "the abundance of the positions that I've procured are sedentary type employment opportunities which would allow a person, even if they did have an existing back problem, that they would be able to participate within that employment opportunity." (TR 96). Further, he stated that it is his understanding that by law, every employee is entitled to a ten to fifteen minute break after working for two hours, which would accommodate any sitting or standing restrictions that may be placed upon Claimant due to his back injury. (TR 99). Mr. Bilski testified that all of the jobs included in the surveys are consistent with the physical limitations placed on Claimant by Drs. McAuliffe, Miot, and Kessler. (TR 118-119).

Mr. Bilski prepared the November 18, 2001 labor market survey by contacting employers by telephone and in-person, and conducting Internet searches. (TR 67). Mr. Bilski mostly

looked for sedentary work with no lifting over ten pounds based on the restrictions and limitations placed on Claimant by various physicians. (TR 62). Mr. Bilski stated that nine or ten of the job opportunities in this survey are in Miami. (TR 69). He believes that Friendly Ford is approximately seventeen miles from Claimant's residence, Braman Mini of Miami is approximately twenty six and one-half miles from Claimant's residence, and Aerospace Precision is approximately six miles from Claimant's residence. (TR 120-121). After the first survey, Mr. Bilski was instructed not to include employment opportunities over twenty-five miles from Claimant's residence, and he made the appropriate adjustment in his later surveys. (TR 72). Mr. Bilski testified that Claimant was offered a fund raising position with With Community Services, which was included in the November 18, 2001 labor market survey. (TR 80). Mr. Bilski performed a job analysis of the With Community Services position, but it is not included in the survey. (TR 86). Mr. Bilski testified that Claimant's right thumb impairment would not affect his ability to perform this job because the worker has a headphone set and needs to press one of four keys on the keyboard. He stated that Claimant could use his left or right hand to press the key. (TR 92-93). Mr. Bilski testified that Dr. Kessler approved of this position, and Drs. Schwarz and Eastlick did not respond to his request for approval/disapproval of the job. (TR 94). He further testified that Claimant could go out to his car and lie down during his breaks at With Community Services, as long as he was back at his desk within the allotted time. (TR 100).

This survey also included unarmed security guard positions. Mr. Bilski testified that an unarmed security guard position is preferred employment for an individual with physical limitations who requires sedentary work. (TR 122). Mr. Bilski testified that the position with G&C Security would require Claimant to be in a vehicle driving around to various posts. *Id*. Mr. Bilski stated that the unarmed security guard positions with G&C Security and Weisser Security are within twenty-five miles of Claimant's residence. (TR 123). Mr. Bilski contacted the Department of Licensing to determine whether Claimant could obtain a Class D license. (TR 124). He was told that a withheld adjudication of a charge of possession of cocaine would not effect his obtaining a Class D license, so long as the adjudication was withheld more than three years ago. *Id*. He was also told that several DUIs in the 1980s and several assault charges and arrests in the 1980s would not effect his obtaining a Class D license. (TR 125). Mr. Bilski was also told that an individual with three DUIs within the last ten years would not qualify for a Class D license. (TR 126). Crowley offered to pay the course and licensing fees required for Claimant to obtain a Class D license. (TR 127). Mr. Bilski testified that all of the positions identified in the November 18, 2001 labor market survey took into account Claimant's limitations according to Drs. Miot, Kessler, and Milowe, and that all of the positions would be appropriate if Claimant had a low back injury and was restricted to sedentary work. (TR 128-129).

Mr. Bilski prepared a second labor market survey dated February 4, 2002. (TR 130). He testified that unarmed security guard positions are "regularly and routinely" available, and at the time of the hearing, G&C Security and Weisser Security were hiring. (TR 132). Mr. Bilski testified that the position with Mega Marine Yacht is within twenty-five miles of Claimant's residence. *Id*. Mr. Bilski spoke with individuals at Dolphin Fence of South Florida, M&M Welding, Prezant Iron Works, and Ironclade Welding Inc. and learned that lifting more than twenty pounds was not a requirement for those welding positions. (TR 134-137, 139). Mr. Bilski acknowledged that these positions are not sedentary. (TR 151). Mr. Bilski testified that

these welding jobs did not require a lot of social interaction. (TR 138). He also testified that if Claimant's math skills are around a sixth grade level, he would be able to perform the simple mathematical calculations necessary to perform the welding position with Prezant Iron Works. (TR 137). Mr. Bilski considered Claimant qualified for these welding positions based on his experience welding for Bootleg Trailer and Crowley. (TR 139)

Mr. Bilski testified that the duties of the night audit clerk at Fort Lauderdale Marina are to greet nighttime guests of the marina, process check-outs, register work, and simple accounting. (TR 140). He testified that according to the Dictionary of Occupational Titles, a person with a G.E.D. could perform this position. *Id.*

Mr. Bilski prepared a third labor market survey dated May 12, 2002. (TR 81). Mr. Bilski testified that he contacted Marooni Ford and Bayview Cadillac in-person and by telephone. (TR 82). He testified that experience is required for the service writer positions with both of these companies, and acknowledged that Claimant did not have any experience as a service writer. (TR 82-83). However, Mr. Bilski "wanted [Claimant] to make the effort to meet with the employer[s] and at that point receive consideration attributable to his other transferable skills such as a mechanic background."[19] (TR 83). Mr. Bilski testified that Claimant is not qualified "per se" for the two supervisory positions with Coca-Cola Bottling Company, but he still wanted Claimant to submit an application and proceed with an interview. (TR 85). Mr. Bilski testified that when he prepared this labor market survey there was a position available at ACR Electronics, but that when he sent them a letter on June 21, 2002, the position had been filled. (TR 107). When he spoke with Debbie Webb at ACR Electronics there was a full-time position available, even though her response indicates that there was only a temporary position available. (TR 108; EX 1, V5, T3, pp. 173-174). Mr. Bilski did not receive a copy of the June 18, 2002 letter from BoAir Inc. that it did not have a sewing machine operator position available. (TR 110; EX1, V5, T3, p. 164). Mr. Bilski stated that he contacted ACR Electronics, BoAir Inc., Tri-County Truck and Equipment, L& L Supply, Skin Tech, Craft-matic Inc., Copyco, and Book Liquidators by telephone, and he contacted TJ Maxx, Deerfield in person. (TR 110-111). Mr. Bilski did not perform an on-site job analysis for any of the positions contained in the May 12, 2002 labor market survey.[20] (TR 85-86).

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[19] Mr. Bilski testified that "in the Longshore arena we are looking for consideration, that the individual had received consideration from that employer." (TR 79). A claimant gets "consideration" when he/she "speak[s] with the employer and [the employer] tells me at that point that [it] will accept the application and interview the person after the review of that application, they are receiving some form of consideration at that point in time." (TR 80).

[20] Mr. Bilski explained that his license was suspended in error for approximately two years during the time that he prepared the November 18, 2001 and May 12, 2002 labor market surveys because there was a mix-up when the licensing was transferred from the Division of Workers' Compensation to the Department of Education, but that he sat for a one-hour refresher course, paid the fee, and received the same workmen's compensation certification number. (TR 90-91). It is Mr. Bilski's opinion that his license was never suspended because he received the same certification number and if his license has been suspended, he would have received a new number. (TR 92).

Mr. Bilski testified that the wages contained in the labor market surveys are higher than the wages were in 1998, the time of Claimant's right shoulder injury, but that they are "still within the ballpark of 1998 [wages]." (TR 133). For instance, he testified that the purchasing agent position identified in the February 4, 2002 labor market survey paid $13.00 an hour, which would equate to $9.75 an hour in 1998. *Id*. He identified several welding positions in the same labor market survey paying $9.00 to $10.50 an hour, and Mr. Bilski testified that those positions would have paid $9.52 in 1998. (TR 134, 136). He also testified that the floor waxer position paid $7.00 an hour in 2002, compared to $6.44 an hour in 1998. (TR 141). Further, he testified that the positions of night audit clerk and inbound sales representative, which he identified as paying $8.50 and $8.75 an hour, respectively, would have paid $6.44 an hour in 1998. (TR 141-142). Finally, Mr. Bilski identified an unarmed security guard that paid $8.00 an hour, and he testified that it would have paid $6.68 an hour in 1998. (TR 142).

Mr. Bilski testified that he does not provide telephone numbers in his labor market surveys because "the best approach [for an individual to procure employment] is to go to the employer, meet with the employer, submit an application and interview, not to make a phone call to the employer. Over years of experience, which are thirteen, the employer is not really conducive to that phone call." (TR 70). Mr. Bilski stated that, in his opinion, if a job opportunity is in the labor market survey, then the individual is physically capable of performing that job. (TR 70-71). Further, he testified that when he writes "experience has shown personal contact with potential employers is the most reliable method of determining the labor market in any given area" in his reports, he is referring to personal and telephonic contact with potential employers by himself and the claimant. (TR 113-114).

Mr. Bilski began scheduling interviews for Claimant in correspondence to his counsel dated February 3, 2003. (TR 102). Mr. Bilski documented Claimant's failure to appear at the interviews contained in that correspondence, but he acknowledged that the correspondence was sent to the wrong address. (TR 103). Mr. Bilski began scheduling interviews for Claimant because it is his standard procedure; he does not allow a claimant schedule his or her own interviews. (TR 104). He explained that "by my scheduling interviews, by my following up, by my being there at the time of the interview to monitor and assist the individual, it is a heck of a lot more productive than leaving it up to the individual who has been out of work for an extended period of time and in most cases, scheduling their own interview and just giving them a phone number. That doesn't work." *Id*.

Mr. Bilski testified that Dr. Kessler approved every job in the labor market surveys except the position with BoAir Inc. (TR 117-118). Dr. Milowe also approved all of the jobs in the labor market surveys. (TR 60-61, 119). Mr. Bilski sent Dr. Schwarz every labor market survey he prepared and asked him to approve or disapprove the jobs, but Dr. Schwarz never responded. (TR 57). Mr. Bilski had a copy of Dr. Schwarz's handwritten notes and four days before the hearing he received a copy of Dr. Schwarz's deposition, which he "briefed through." (TR 58). From the deposition, Mr. Bilski learned that Dr. Schwarz did not approve of any type of work for Claimant. (TR 58-59). Mr. Bilski could not read one page of Dr. Schwarz's notes and he tried to clarify through correspondence, but Dr. Schwarz did not respond. (TR 71). Mr.

Bilski testified that he "does not know where to go" with the fact that Dr. Milowe approved all of the jobs whereas Dr. Schwarz disapproved all of the jobs in the surveys. (TR 59).

Mr. Bilski opined that there exists within Claimant's geographic area specific and realistic employment opportunities which he is capable of performing considering his age, education, work experience, and physical restrictions to his right thumb, left shoulder, and right shoulder. (TR 147-148). Also, he opined that the sedentary positions he identified would accommodate a low back injury which required him to stretch and move about at intervals. (TR 148). Mr. Bilski stated that his definition of sedentary work is "no lifting in excess of ten pounds, the ability to sit, stand, [and] adjust frequently." *Id*. Mr. Bilski further opined that Claimant has not made a good faith effort to obtain suitable alternate employment because "he has not submitted applications or interviewed with employers that I have asked him to do so with" and he has not shown up to any of the interviews that Mr. Bilski has scheduled over the past four or five weeks. (TR 149-150). He also stated that Claimant has sabotaged employment opportunities when he called the potential employers. (TR 150).

Charles Meridth's Testimony

Charles Meridth is the maintenance manager for Crowley. (TR 416). Mr. Meridth has worked for Crowley for fifteen years and has been at the Port Everglades terminal for a little over four years. *Id*. Mr. Meridth was Claimant's supervisor from November of 1998 to April of 1999. (TR 417). Mr. Meridth testified that the Early Return to Work Program "was a plan we put together to bring employees back to work who are not yet fully released for work, but to help them rehabilitate themselves and get them back in the work place." *Id*. He testified that an employee could only be in this program for six months. *Id*. Currently there is no Early Return to Work Program at the Port Everglades terminal. (TR 418). When Mr. Meridth supervised Claimant, he was working under the Early Return to Work Program. *Id*. Claimant was working as an electrical mechanic due to his lifting, pushing, and climbing restrictions. *Id*. An electrical mechanic is responsible for replacing light bulbs and seals. (TR 424, 429). It requires limited use of the hands and most of the work is performed between the mechanic's knees and waist, although bending is required. *Id*. Mr. Meridth does not recall whether Claimant drove the MSU while in this program. (TR 424). Claimant never complained to him of a work-related back injury. (TR 427).

Mr. Meridth testified that the speed lane is where minor repairs and tire work are performed. (TR 419). He testified that an average of seventy units[21] go through the speed lane on an average day,[22] of which sixty to sixty-five percent are full loads. (TR 419-420). He also testified that trailer mechanics only open the doors of empty containers. (TR 419).

Mr. Meridth testified that since he has been at the Port Everglades terminal there have been ladders of varying sizes available to the trailer mechanics. (TR 425). Mr. Meridth is

[21] A "unit" may be a trailer, a chassis, or a container. (TR 428).

[22] An "average day" consists of two eight-hour shifts. (TR 431).

responsible for purchasing equipment, and he testified that he has purchased ladders for Crowley. (TR 426). In addition, Mr. Meridth has reviewed invoices for the purchase of a rolling A-frame ladder (scaffold), four-foot stepladders, six-foot stepladders, and an extension ladder in 1997. (TR 426, 432, 433). He has purchased similar ladders during his tenure at Crowley. (TR 433). Mr. Meridth testified that he can purchase equipment without approval and that no one has ever put budget restraints on his purchasing of equipment. (TR 426-427). He has purchased more than ten ladders during his tenure at Crowley. (TR 431). Mr. Meridth testified that there are normally two ladders in the speed lane, six scaffolds (with hand rails) in the shop, and one ladder per MSU. *Id*. He testified that the scaffold ladder is approximately six feet tall, and is the ladder that he prefers to use to climb in and out of trailers because it has hand rails and "there's no chance of the employee falling." (TR 434). Mr. Meridth testified that it is not mandatory for trailer mechanics to use ladders, but they are available. (TR 433).

Dr. Irvin Milowe's Testimony

Dr. Irvin Milowe is a psychiatrist who evaluated Claimant on behalf of Employer. (TR 435, 440). Dr. Milowe interviewed Claimant on October 14, 2001, and subsequently reviewed all of the medical, surgical, and physical therapy records, Dr. Schwarz's records and deposition, Dr. Zislis' records, and the two depositions of Claimant. (TR 440-441). Dr. Milowe described his mental status examination, and then testified that he found no signs of psychosis.[23] (TR 449-451). Dr. Milowe found no evidence that Claimant is a psychopath, which is someone who can lie to your face without any anxiety or guilt and is impulsive. (TR 451-452). Dr. Milowe also performed cognitive tests, which were "unremarkable." (TR 453). Dr. Milowe noted that Claimant was preoccupied with fantasies of revenge if not given what he wants, that he sat for over two hours without pain, that he demonstrated a full range of affect that was appropriate to the contents, that he was not clinically depressed, and that he has an angry attitude. *Id*. Dr. Milowe testified that Claimant has a lifetime history of immaturity and impulsivity, he has a very low frustration tolerance, he becomes easily depressed, he is distant from his wife and children, and he does not trust anyone. (TR 453-454). Dr. Milowe testified that these conditions do not satisfy the definition of clinical depression because it does not meet the DSM[24] criteria for severity and persistence, and he is not vegetative. (TR 454). Dr. Milowe classified Claimant as chronic adjustment disorder with mixed disturbance of emotion and conduct, depression, and threatened aggression. (TR 455). Dr. Milowe further testified that Claimant's work-related injuries did not aggravate his psychiatric condition because "I see this more as a lifetime attitude that he has, which is like an immature child. Which is that he wants what he wants when he wants it." *Id*.

[23] Psychosis is "an absence of a capacity to test reality," and is usually schizophrenia or bipolar disorder. (TR 451).

[24] DSM is a "diagnostic statistical manual which has the diagnoses and the criteria sets for all of the diagnoses." (TR 438).

Dr. Milowe criticized the records from Dr. Schwarz, Claimant's treating psychiatrist. (TR 442). First, he testified that Dr. Schwarz appeared to be a psychopharmacologist.[25] (TR 442-443). Second, Dr. Milowe testified that "it's exceptionally rare when I see a psychiatric record that is as below the standards of care as Dr. Schwarz's." (TR 443). He explained that Dr. Schwarz's records did not include a mental status examination, which is part of an evaluation under the psychiatric guidelines. *Id*. Dr. Milowe testified that it is particularly important to document an individual's mental state, history of violence, and nature of his claims if it is suspected that the individual is psychotic, which Dr. Schwarz mentioned several times in his deposition. *Id*. Dr. Schwarz's records did not mention that Claimant's father abandoned him at age three or four, that his mother physically abused him and then left, or his history of violence. (TR 445-446). Further, Dr. Schwarz's records did not contain a DSM diagnosis or a treatment plan. (TR 444). Third, Dr. Milowe pointed out that Dr. Schwarz's records did not indicate how much time he spent with Claimant, and then he characterized their appointments as "occasional medication management meetings." (TR 446-447). Finally, Dr. Milowe testified that Dr. Schwarz's records did not indicate if the Zyprexia, which is a potent anti-psychotic, was actually working. (TR 447).

Dr. Milowe testified that Zyprexia gets rid of delusions and hallucinations, and so Claimant should be able to work, unless there is an idiosyncratic reaction, the amount of the prescription is too high, or it adversely combines with another medication. (TR 448). He testified that Serazone and Wellbutrin are used to treat depression, and that they would make it "easier for [Claimant] to function in the real world." (TR 448-449). Dr. Milowe opined that Claimant was on the right medications during their interview because "he was totally rational, totally in control, [and] able to give a chronological [history]." (TR 475). Dr. Milowe testified that if Claimant was his patient, he would receive psychotherapy to help him adjust to his current situation in addition to medications, rather than solely medications. (TR 479-480).

Dr. Milowe reviewed Mr. Bilski's labor market surveys and testified that there was no psychiatric reason that Claimant could not perform those jobs. (TR 456). Dr. Milowe testified that Claimant has enough reality testing that he could perform those jobs, but that right now Claimant has made it clear that he is not going to take one of those jobs because "[Employer] is responsible for the situation, for the taking of his benefits away, and [Employer]owe [s] him." (TR 460). Dr. Milowe testified that Claimant wants a settlement because he wants to "run a small business, like car repairs. Basically delegating or subcontracting out any tasks his hand difficulty would preclude." (TR 457, 460). He testified that Claimant resents being offered entry-level jobs, which are far below his former job at Crowley. (TR 457). Also, he testified that Claimant's inability to perform his former job at Crowley, "which was the real high point in his life, has been a very, very bitter and painful disappointment to him." (TR 456). Dr. Milowe testified that although Claimant has an anger problem, he thinks that Claimant can control his anger in order to keep his job. (TR 461). Dr. Milowe pointed out that the law requires a psychiatrist to report to the police if an individual is reasonably predicted to be dangerous, an action which Dr. Milowe has felt unnecessary in this case. (TR 462-463).

[25] A psychopharmacologist is a psychiatrist who prescribes medications but is not trained in psychotherapy. (TR 480).

Dr. Milowe testified that most people who have worked in labor intensive jobs and now are unable to do so will adjust to their new situation. Those people who do not adjust need psychotherapy. (TR 470). Dr. Milowe testified that pain is a stressor that may trigger Claimant's anger, but he also pointed out that Claimant is not doing physical therapy for his shoulders. (TR 473). He also testified that Claimant's inability to perform his former job may be a stressor, and that he has not been able to move on because he feels "entitled to eyes for eyes and teeth for teeth." *Id*.

Claimant's 2000 Deposition[26]

Claimant testified that before he started working for Employer, he had surgery on his back. (EX 1, V2, T1, p. 23). He stated that he was not injured, but that he started to have low back pain with a little radiation down his left leg, and so he went to Dr. Purita for surgery. *Id.* at 23-25. Claimant testified that there was a slight bulge at L5, and that Dr. Purita "trimmed it out and ground on the bone a little bit to give my sciatic nerve some room." *Id.* at 24-25.

Claimant testified that his back was bothering him before he fell in the hole in July of 1997. *Id.* at 30. He explained that it would get really sore if he was "cracking open tractor trailers and stuff all day" and that his foot was going to sleep. *Id*.

Claimant also testified regarding his lack of job skills. He testified that "I am not a salesman. I am a mechanic.... I've always worked with my hands. I'm no good with people." *Id.* at 34. He also stated that he is not a car mechanic, he does not use a computer, and he can only type with one finger. *Id.* at 43-44, 51. Claimant expressed an interest in a nonphysical job at Crowley. *Id.* at 52. He testified that there is "an over sixty plus thousand a year job" and that he "[doesn't] plan on walking away from that one." *Id.* at 91.

Claimant's 2003 Deposition

Claimant testified about his criminal background which would prevent him from obtaining a Class D license to become an unarmed security guard. He testified that he had beaten a guy with a baseball bat and that he had three or four assault charges, five or six DUIs, and drug arrests. (EX 1, V5, T3, pp. 52-53). However, he has never been convicted of a felony or a crime involving theft or dishonesty. *Id.* at 53.

Claimant mowed his neighbor's lawn for three to five months, for which he charged fifteen dollars a month, but he had to stop because it hurt his shoulders too much. *Id.* at 92-93. He has not performed any other jobs since his deposition in December of 2000. *Id.* at 94.

Claimant explained that July 1, 1999 is the date that his back pain became "unbearable," and that the pain is due to repeatedly climbing in and jumping out of trailers and picking up leaf

[26] Since Claimant's deposition testimony is similar to his testimony at the hearing, only information not covered at the hearing or inconsistent testimony will be summarized.

springs (which weigh in excess of two hundred pounds), axles, brake drums, and spiders. *Id.* at 102-103. Claimant testified that his back needs to be better before he can have the shoulder surgeries. *Id.* at 103-104. In 2002, Dr. Cantor told Claimant that his back problems are going to be lifelong. *Id.* at 105.

Medical Records

Dr. Bernard F. Miot

Dr. Bernard F. Miot began treating Claimant on April 11, 1995. (EX 1, V7, T1, p. 13). Dr. Miot initially treated Claimant's left shoulder pain with physical therapy and steroid injections. *Id.* at 12. An MRI was performed on May 16, 1995, which revealed no tear in the rotator cuff, but there was a questionable small labral tear of the anterior labrum. *Id.* at 11. On September 9, 1995, Dr. Miot performed an acromioplasty of the left shoulder. *Id.* at 10. After the surgery Claimant occasionally experienced soreness, but on December 4, 1995, Dr. Miot determined that Claimant could return to full-duty work. *Id.* at 8. On August 7, 1996, Dr. Miot noted that Claimant's left shoulder had good strength and that there was painless full range of motion. *Id.* at 6. At that time, Dr. Miot stated that Claimant had reached maximum medical improvement (MMI) and assigned no permanent physical impairment. *Id.* at 7.

On May 6, 1998, Dr. Miot began treating Claimant for a right shoulder injury. *Id.* at 24. The x-ray revealed a Type III acromion and sclerosis to the greater tuberosity area. An MRI was performed on May 15, 1998, which revealed tendinitis to the supraspinatus tendon, but no rotator cuff tear. *Id.* at 23. Claimant was initially treated with physical therapy, but when that failed, Dr. Miot performed an excision of the distal clavicle and acromioplasty of the right shoulder on July 9, 1998. *Id.* at 20, 23. On July 23, 1998, Dr. Miot released Claimant to light-duty work, but restricted his use of his right upper extremity. *Id.* at 20. On August 19, 1998, Dr. Miot stated that Claimant could lift, push, and pull no more than ten pounds with his right upper extremity, but he was still restricted to light-duty work. *Id.* at 19. On October 19, 1998, Dr. Miot stated that Claimant could lift, push, and pull up to thirty pounds with his right upper extremity, but he was still restricted to light-duty work. *Id.* at 17. On October 3, 1998, Dr. Miot approved the position of electrical trailer mechanic for Claimant. (EX 1, V3, T1, p. 251; EX 1, V7, T1, p. 43).

Dr. John A. McAuliffe

Dr. John A. McAuliffe, an orthopedic surgeon, began treating Claimant on March 11, 1997. (EX 1, V5, T5, pp. 4, 47). He noted that Claimant suffered a dorsal dislocation of the MP joint of the right thumb on October 31, 1996, which was originally treated with a cast for five and one-half weeks. Two weeks after the cast was removed, Claimant spontaneously dislocated the joint again. On April 14, 1997, Dr. McAuliffe performed an arthrodesis (fusion) of the MP joint of the right thumb. *Id.* at 58. After the surgery, Claimant received physical therapy for his thumb. On May 15, 1997, Dr. McAuliffe released Claimant to work so long as he wore a splint and lifted and carried no more than two pounds. *Id.* at 61. On June 5, 1997, Dr. McAuliffe reduced the weight restriction to ten to fifteen pounds, and on July 17, 1997, it was further reduced to twenty pounds. *Id.* at 64, 67. On August 26, 1997, Dr. McAuliffe discontinued Claimant's physical therapy, released him to work without the splint and restricted his lifting to

no more than fifty pounds with both upper extremities. *Id.* at 70. He also cautioned against heavy single-handed use with the right thumb. On October 7, 1997, Dr. McAuliffe opined that Claimant had reached MMI and could return to full-duty work without any restrictions. *Id.* at 72. Dr. McAuliffe assigned a seven percent impairment of the right thumb, with a corresponding two percent impairment of the person, according to the Fourth Edition of the AMA *Guides to the Evaluation of Impairment*.

Dr. McAuliffe was deposed on September 12, 2000. (EX 1, V5, T5). Dr. McAuliffe testified that during the surgery he placed two metal pins and a metal wire in Claimant's right thumb to hold the bones in place while the fusion healed. *Id.* at 11. He stated that once the fusion had healed solidly, about one year after the surgery, the hardware could be removed if it was uncomfortable. *Id*.

Dr. McAuliffe testified that when he found that Claimant had reached MMI, he did not place any work restrictions upon him. *Id*. He stated that his AMA rating of Claimant's permanent thumb impairment did not take into account Claimant's pain because pain is a subjective complaint and is difficult to rate. *Id.* at 16. He also opined that Claimant's diminished range of motion from the joint to the tip of the thumb should not affect his fine hand motor skills. *Id.* at 18-19.

At the time of the deposition, Dr. McAuliffe had not seen Claimant for almost three years, and so he did not know Claimant's current thumb condition. *Id.* at 14.

Dr. Richard M. Linn

Dr. Richard M. Linn first evaluated Claimant on July 18, 1997. (EX 1, V1, T7). He noted that Claimant injured his knee when he stepped into a hole on July 7, 1997 and twisted his knee. On examination, Dr. Linn noted a small knee effusion, tenderness over the medial joint line, a "pop," and about 1+ valgus instability in thirty degrees of flexion. The x-rays of Claimant's knee were negative. Dr. Linn diagnosed medial meniscal tear and recommended surgery. On July 22, 1997, Dr. Linn performed left knee arthroscopy, which revealed a small bucket-handle tear of the medial meniscus, and a partial medial meniscectomy was performed. (EX 1, V1, T7, p. 289; EX1, V1, T8, p. 349). During a follow-up visit on August 29, 1997, Claimant stated that recently he had been experiencing leg pain, which started in his buttocks and radiated down his left foot. *Id.* at 291. He described this leg pain as similar to the pain he had before his 1993 laminectomy. Dr. Linn also stated that Claimant had twisted his back when he stepped into the hole. The x-ray of the lumbar spine revealed degenerative changes at the L5-S1 level, with narrowing and spur formation anteriorly. Dr. Linn ordered a MRI, which revealed "degenerative changes with retrolisthesis, bulging disk annulus, end-plate phenomenon and spondylosis; 2) L4-5 shows disk bulging with mild impression on the sac without stenosis or focal nerve root effacement." *Id.* at 292. Dr. Linn concluded that Claimant had a "left L5 radiculopathy secondary to his fall of 7/7/97." *Id*. On October 7, 1997, Claimant reported back pain radiating down his left leg, and Dr. Linn recommended a course of epidural steroids.[27] *Id.*

[27] Claimant underwent three lumbar epidural steroid injections between October 14, 1997 and November 10, 1997. (EX 1, V1, T8). These injections were performed by Dr. Jonathan Aarons.

at 293. After three epidural steroid injections, Claimant returned to Dr. Linn's office on December 15, 1997. *Id.* at 294. Dr. Linn examined Claimant's lumbar spine and noted a mild spasm and restriction in range of motion. He also examined Claimant's knee, which revealed mild tenderness along the medial joint. Dr. Linn opined that Claimant had reached MMI. Using the AMA *Guides*, Dr. Linn assigned a ten percent permanent medical impairment to the body as a whole, representing Claimant's injuries to his low back and left knee.

Dr. Lewis Eastlick

Dr. Lewis Eastlick began treating Claimant's right thumb injury on January 22, 1998. (EX 1, V7, T2, p. 7). Claimant's chief complaint was pain and pressure over the area of the hardware implanted by Dr. McAuliffe. Dr. Eastlick recommended removal of the hardware in order to gain some excursion in the tendon and relieve the pain. On February 16, 1998, Dr. Eastlick performed surgery, removing the implants and tenolysis of the right thumb. *Id.* at 10. On March 19, 1998, Dr. Eastlick released Claimant to full-duty work due to his improved range of motion and overall use of his hand. (EX 1, V7, T2, p. 12). On April 21, 1998, Dr. Eastlick determined that Claimant had reached MMI and that he could continue his full-duty work. *Id.* at 12.

Dr. Kevin J. Kessler

Dr. Kevin J. Kessler, an orthopedic surgeon, began treating Claimant on November 24, 1998. (EX 1, V5, T4, pp. 3, 41). Claimant reported that Dr. Miot had performed two surgeries on his shoulder, but he continued to experience discomfort in his right shoulder, as if it was slipping out of place. On examination, Claimant had "excellent" range of motion and no impingement. *Id.* at 41. Dr. Kessler stated that "I think that Dr. Miot did an excellent job with the acromioplasty and AC joint resection," but recommended a MRI to determine if Claimant had a SLAP tear. *Id*. On January 5, 1999, Dr. Kessler noted that Claimant could not tolerate the arthrogram portion of the MRI, and that the MRI did not show any definitive interarticular pathology. *Id.* at 40. On examination, Dr. Kessler noted a clicking in the right shoulder and a slight positive impingement. Dr. Kessler recommended arthroscopic surgery to determine if there is a labral tear. Dr. Kessler saw Claimant on January 12, 1999. *Id.* at 39. Claimant reported a sharp pain when he was doing some drilling and lifting. Dr. Kessler noted that upon examination there was a small knot area in the mid-supraspinatus area, and recommended that Claimant not perform any heavy construction work. Claimant next saw Dr. Kessler on February 26, 1999. *Id.* at 38. Claimant reported that he wanted to return to work, but that he could not do overhead lifting or heavy manual work. On examination, Claimant had almost full range of motion. Claimant did not want further surgery (he had cancelled the surgery recommended on January 5, 1999) and Dr. Kessler determined that he had reached MMI. Dr. Kessler placed the following restrictions on Claimant: no repetitive overhead lifting and no lifting of more than fifty pounds.

Claimant returned to Dr. Kessler on November 10, 1999, complaining of left shoulder pain. *Id.* at 36. Claimant reported that he had intermittent problems with his left shoulder over the past four years, and that fine motions create a shooting, burning pain. On examination, Dr.

Kessler noted that Claimant had a full range of motion and no impingement. He did note a slight clicking and a mildly positive O'Brien's sign. Dr. Kessler recommended a MR arthrogram.

Dr. Kessler's final visit with Claimant was on June 27, 2000. *Id.* at 35. It had been five months since his back surgery with Dr. Cantor, and Claimant reported that he had been experiencing a slight burning sensation in both of his shoulders. On examination, Claimant had a full range of motion and no impingement. Dr. Kessler prescribed Naprosyn to reduce the bilateral shoulder discomfort, and restricted his work to no overhead lifting and no lifting of more than twenty-five pounds.

Dr. Kessler was deposed on December 1, 2000. (EX 1, V5, T4). He testified that the December 23, 1998 MRI did not reveal a definite labral tear or rotator cuff tear, but that there were subjective and objective test findings consistent with a labral tear or a ligament tear in Claimant's right shoulder. *Id.* at 11, 22. Dr. Kessler recommended exploratory surgery to determine if a tear exists, but he also did not want Claimant to undergo unnecessary surgery. *Id.* at 23-25. Dr. Kessler stated that the December 15, 1999 MR arthrogram of Claimant's left shoulder did not reveal a rotator cuff tear, but that the MRI did reveal some degenerative changes. *Id.* at 17-18. Dr. Kessler explained that Claimant has had recurrent problems with both shoulders, which he has treated conservatively. *Id.* at 26. Dr. Kessler acknowledged that this type of treatment could result in Claimant needing intermittent medication or physical therapy. *Id*.

Dr. Kessler stated that in determining work restrictions, he is in part dependent upon the subjective complaints of pain and/or restrictions of motion reported by the patient. *Id.* at 6-7. He testified that he placed work restrictions of no overhead lifting and no lifting of more than twenty-five pounds on June 27, 2000, based on Claimant's subjective complaints, as the physical examination was normal. *Id.* at 19. During the deposition, Dr. Kessler completed an OWCP-5 work form, indicating that Claimant could intermittently lift up to fifty pounds for six hours a day, intermittently climb for four hours a day, and sit, walk, bend, squat, kneel, twist, and stand for eight hours a day. *Id.* at 20-21, 34. Dr. Kessler testified that these work restrictions are for both shoulders, but that he was leaning towards the right shoulder when he completed the form, as that is what Dr. Kessler had treated. *Id.* at 27. Further, he testified that these work restrictions do not take into account Claimant's back and psychiatric conditions. *Id.* at 28.

Dr. Paul D. Zislis

Dr. Paul D. Zislis, a psychiatrist, began treating Claimant on May 7, 1999. (EX 1, V6, T3). During the first visit, Dr. Zislis performed a psychiatric evaluation. *Id.* at 4-7. He noted that Claimant reported a lifelong history of dysphoric mood and quick temper. He also noted that Claimant's mother was verbally abusive. Dr. Zislis diagnosed Claimant with "depression NOS" and bilateral shoulder pain. Dr. Zislis prescribed medication and therapy. Dr. Zislis had two more sessions with Claimant, each a half an hour long, before he moved his practice. *Id.* at 8, 10.

Dr. Jeffrey B. Cantor

Dr. Jeffrey B. Cantor, an orthopedic surgeon, first evaluated Claimant's back problem on November 9, 1999. (EX 1, V1, T1, p. 10). He noted that Claimant fell off of a roof when he was a teenager, and that Dr. Purita performed a lumbar hemilaminotomy/discectomy about five years before, which never resulted in a substantial amount of back pain relief. He also noted that Claimant's back and leg pain started to recur about two and one-half to three years before, and it has become progressively more severe. He noted that Claimant regularly has numb and shocking feelings in his legs. Claimant stated that he is unable to do almost anything because of the back pain. On examination, Dr. Cantor noted that Claimant displayed discomfort when standing from a sitting position and that he cannot stand up straight. Dr. Cantor also noted that Claimant had significant paraspinal muscle spasm bilaterally and flattening of his lumbar lordosis, and that his lumbar range of motion was markedly decreased in all directions. Dr. Cantor noted that any deep palpation of the L5-S1 level caused exquisite pain and reproduced Claimant's back and leg symptoms, and that hypertension of the back reproduced the leg pains. The plain radiographs revealed a markedly degenerated and collapsed L5-S1 interspace with several bilateral lateral recess stenosis. *Id.* at 9. The January 7, 2000 MRI revealed a small, central L5-S1 disc herniation with Type II bony endplate degenerative changes and a small, right-sided L4-5 disc herniation with partial degeneration. *Id.* at 76. On January 10, 2000, Dr. Cantor performed an anterior lumbar interbody fusion at the L5-S1. (EX 1, V1, T1, p. 39; EX 1, V6, T4, p. 238). On March 9, 2000, during a follow-up visit, Claimant reported that his leg pain was gone, but that he experienced back pain when he sits or stands for a long period of time. (EX 1, V1, T1, p. 7). On June 6, 2000, Dr. Cantor noted that Claimant was "doing quite well," that his pain was about eighty-five to ninety percent better, that he was able to walk for long periods of time, and that he no longer experienced leg pain. *Id*. He stated that as of June 6, 2000, Claimant could return to light-duty work, with a lifting restriction of forty pounds, no bending, twisting or prolonged sitting, and frequent position changes. *Id.* at 74.

Claimant saw Dr. Cantor on January 2, 2001, complaining of mechanical pain is his low back. *Id.* at 6. Claimant stated that he experienced discomfort when initially lying down or rolling over in bed, and that he had significant back discomfort associated with motion. The x-ray revealed solid arthrodesis anteriorly at the L5-S1 level and a clear non-union with motion at the L4-5 level. *Id*. The April 18, 2001 MRI revealed no evidence of recurrent disc herniation and a small amount of residual scar tissue in the epidural space at the L5-S1 level without thecal sac effacement or nerve root impingement. *Id.* at 28. On May 21, 2001, Dr. Cantor performed a bilateral lateral fusion at L4-L5-S1, hemilaminotomy L5-S1 left, and segmental instrumentation from L4 to S1. (EX 1, V1, T1, p. 14; EX 1, V6, T4, p. 73). On June 5, 2001, Claimant reported that he was feeling better and that he was able to walk. (EX 1, V1, T1, p. 5). Claimant's last visit with Dr. Cantor was on February 22, 2002. *Id.* at 2. Claimant reported that the pain in his back was much better, but that he continued to have some residual lower extremity discomfort. Dr. Cantor felt that pain management interventions would be effective, and so he prescribed Neurontin.

Dr. Cantor was deposed on November 28, 2001. (EX 1, V2, T2). Dr. Cantor explained that the first surgery was a two-level fusion, but that one of the bone grafts did not solidly heal, and so he performed a second surgery on Claimant's back. *Id.* at 138-139. Dr. Cantor stated that

non-unions, where the grafts do not heal solidly, occur about fifteen percent of the time. *Id.* at 139. Dr. Cantor testified that, at the time of the deposition, Claimant was "pretty close" to MMI and that he would place the following restrictions on Claimant: no lifting of more than fifteen or twenty pounds, frequent position changes, and Claimant could perform light to moderate work. *Id.* at 141. He stated that Claimant "can be relatively active, but... repeated type of cycling of his back, bending, twisting, lifting, is something that's going to cause him problems." *Id.* at 142.

Dr. Cantor testified that the November 9, 1999 x-ray revealed severe disc degeneration and collapse at the L5-S1 level and severe bilateral recess stenosis. *Id.* at 149. He explained that bilateral recess stenosis causes compression of the nerves and leg pain. *Id.* at 150. He stated that Claimant complained of severe pain in the buttocks and leg region, which is consistent with bilateral recess stenosis. *Id*.

Dr. Cantor testified that Claimant did not report that he had fallen into a hole in July of 1997. *Id.* at 161. Claimant indicated on the questionnaire that his reason for the office visit was lower back pain and burning in his legs due to moving stuff in the garage. *Id.* at 160-161. Dr. Cantor was not aware of Claimant's treatment with Dr. Linn or Dr. Linn's opinion that Claimant's back and leg pain were due to his fall in July of 1997. *Id.* at 162-165. Dr. Cantor testified that Claimant reported that he performed "heavy lifting-type activity, in and out of trailers, hooking up hitches to trailers and that sort of stuff" for Crowley, but he does not know how long Claimant worked for Crowley. *Id.* at 167. Dr. Cantor also reported that Claimant stated that his back and leg pain presented when he worked. *Id.* at 189.

Dr. Cantor did not explore the etiology of Claimant's back pain because he was more concerned about the medical problem. *Id.* at 178. Dr. Cantor's goal was to identify the problem and develop a treatment plan, not to obtain a detailed history of Claimant's previous treatment. *Id.* at 179. Dr. Cantor testified that "you have to consider [that Claimant's back condition] has a number of etiologies that are kind of ongoing and building over time." *Id.* at 181. He explained that Claimant's back condition was an "ongoing progressive problem," which "by itself may progress without any precipitating exacerbating factors. And with factors, like twists or falls or heavy lifts or repetitive activity, all of these types of factors can contribute to the type of problem that he has." *Id.* at 187. However, he explained that he did not review Claimant's medical records or history thoroughly, and so he does not have an opinion as to the etiology of Claimant's condition. *Id.* at 187-188. Dr. Cantor also stated that Claimant's condition is the "additive effect of multiple events, [but] without more information [he] cannot state what caused it." *Id.* at 195.

Dr. Irvin D. Milowe

Dr. Irvin D. Milowe, a psychiatrist, evaluated Claimant on October 14, 2001, and his findings are contained in a report of the same date. (EX 1, V6, T5). Dr. Milowe interviewed Claimant, during which they talked about Claimant's childhood, his employment history, and the injuries he sustained at Crowley. Claimant described his fantasy of physically harming "those responsible" for his current condition and his road rage. *Id.* at 2. Claimant also told Dr. Milowe that he fantasized of getting enough remuneration to open a small business. Dr. Milowe stated that there were no signs of psychosis on the mental status examination, and that Claimant was

"cooperative, even joking, and clearly comfortable with me." *Id.* at 3. Dr. Milowe diagnosed "adjustment disorder, chronic, with disturbance of emotions and conduct [depression, and threatened aggression]." *Id*. However, he found that Claimant was not disabled because Claimant indicated that he "would be able to run a small business, like car repairs, basically delegating or sub-contracting out any tasks his hand difficulties would preclude." *Id*. He also stated that this is not a need to warn situation because Claimant had sat less than twenty feet from his fantasized victim, through a full meal, without incident. Dr. Milowe concluded that this demonstrated that Claimant is capable of controlling himself, and thus he is not psychotic.

Dr. Harold S. Reitman

Dr. Harold S. Reitman, an orthopedic surgeon, examined Claimant and reviewed his medical records, and his findings are contained in a report dated December 6, 2001. (EX 1, V1, T6). Claimant complained of stiffness in his back, radiating pain, numbness, tingling, and a burning pain down his left leg. *Id.* at 245-246. Claimant also stated that his back pain is due to his job because he had to do a lot of heavy lifting and turning. *Id.* at 246. Claimant explained that he cannot lift heavy things, pick things up, or bend due to the pain in his back. *Id.* at 247. On examination, Claimant bent forward twenty degrees, his side bending and rotation were limited, and he was able to ambulate normally. *Id.* at 270. The x-rays revealed evidence of his prior back surgeries, but no gross malalignment. *Id.* at 271. Dr. Reitman also reviewed the September 8, 1997 and January 7, 2000 MRIs. He found that the September 8, 1997 MRI revealed disc protrusion at the L5-S1 level and that there were some degenerative changes. *Id*. He stated that there was not "a whole lot of difference" between the September 8, 1997 and January 7, 2000 MRIs. *Id*. Dr. Reitman concluded that Claimant has had longstanding problems with his lumbar spine, "resulting in a permanent disability rating with persistent pain all along those years and pain in the low back radiating down the left lower extremity all those years." *Id.* at 274-275. He opined that Claimant has sustained no permanent impairment due to any work-related injuries. *Id.* at 275. He explained that:

> [Claimant] has longstanding, preexisting problems with degenerative changes with previous surgery and is experiencing the manifestation of the natural progression of his disease. Superimposed upon the natural progression of his problems with his lumbar spine, in this patient who already had the spine surgery in 1993, are the other acute events, such as when he stepped in the hole and sustained injury with problems to his low back and where the treating physician, Dr. Linn, gave the patient a permanent rating because of his low back, as well as his knee. So really, anyway you look at it, the cause of this patient's lumbar spine problems clearly is not his work.

Id.

Dr. Allen J. Teman

Dr. Allen J. Teman, a neurologist, examined Claimant on November 4, 2002. (EX 1, V7, T4, p. 10). Claimant complained of a burning sensation in his left leg, which sometimes encompassed the whole lower half of his body. The physical examination appeared normal. Dr.

Teman diagnosed failed back syndrome and stated that "it is very common for patients who have had multiple back surgeries with instrumentation to have continued complaints afterwards." *Id.* at 11. He recommended that Claimant discuss increasing his Neurontin prescription with Dr. Cantor.

Dr. Irene Estores

Claimant was referred to Dr. Irene Estores by Dr. Teman. Dr. Estores, an assistant professor in neurological surgery, examined Claimant on November 26, 2002. (EX 1, V7, T4, p. 6). Claimant complained of an intense burning sensation in the left buttock and left leg, which were made worse with driving and any other movement. Dr. Estores noted that during the examination Claimant was "obviously uncomfortable in prolonged sitting positions." *Id.* at 7. Dr. Estores diagnosed post-laminectomy syndrome and neuropathic pain. She recommended aquatherapy and the continued use of Neurontin. Claimant had a follow-up visit on January 7, 2003. *Id.* at 4. Dr. Estores reported that the CT scan revealed that the hardware at L4-5 was intact and that the bone graft at L4-5 was not completely mature. Also, there was no evidence of pseudoarthrosis. Dr. Estores noted that there was a small central osteophyte in the L5-S1 region. Dr. Estores reported that the MRI revealed no evidence of a recurrent, residual, or herniated disc or significant central canal or neural foraminal narrowing of the lumbar spine. However, it did reveal a tubular enhancing structure ventral and to the right of the spinal cord beginning at the T12 and extending down to the L2 level. Dr. Estores discontinued the Neurontin and started Claimant on a trial of topiramate. Dr. Estores stated that surgery was not recommended because there would be minimal pain relief.

Dr. Harold Schwarz

Dr. Harold Schwarz was deposed on March 12, 2003. (CX 1, V1, T1). Dr. Schwarz is a psychiatrist and has been treating Claimant since June 28, 2000. *Id.* at 4-5. Dr. Schwarz read his office notes into the record. *Id.* at 7-16. During the June 28, 2000 appointment, Dr. Schwarz took Claimant's histories regarding his employment, work-related injuries, and past psychiatric treatment. *Id.* at 7-9. He also placed the patient on Serzone, an anti-depressant. *Id.* at 9. Dr. Schwarz next saw Claimant on July 5, 2000. Claimant was "still angry, irritable and easily agitated," and Dr. Schwarz continued the Serzone and placed Claimant on Zeprexia, a tranquilizer. *Id*. On July 19, 2000, Dr. Schwarz noted that Claimant's "mood and affect were gradually stabilizing,... less irritability,... needs continued treatment, too unstable to return to work." *Id*. Dr. Schwarz saw Claimant on August 18, 2000, and he noted that Claimant's mood was improved, his irritability had decreased, and that his affect had stabilized. *Id.* at 10. On October 15, 2000, Dr. Schwarz noted that Claimant's affect was angry and that his irritability had increased. *Id*. He also noted that there was a sense of despair in Claimant regarding whether he would be able to work again. *Id.* at 11. Dr. Schwarz increased Claimant's prescriptions for Serzone and Zeprexia. *Id*. Dr. Schwarz next saw Claimant on November 17, 2000. At that time, Claimant's affect was tense, he was easily irritated, and Claimant "felt excluded from his job." *Id*. On December 22, 2000, Dr. Schwarz noted "some lifting of [Claimant's] depression. Still easily irritated... [H]e was depressed, but no suicidal ideation." *Id.* at 12.

Dr. Schwarz next saw Claimant on March 9, 2001, and noted that Claimant's mood was depressed and he was discouraged because he needed lumbar surgery. *Id*. On April 10, 2001, Claimant's condition was stable. *Id*. Dr. Schwarz saw Claimant on June 29, 2001, and noted that Claimant was experiencing physical pain approximately four weeks after back surgery. *Id.* at 13. On September 7, 2001, Dr. Schwarz felt that Claimant had reached MMI psychiatrically, but "felt that he needed continued psychiatric management and continued his present medications." *Id*. On November 6, 2001, Claimant's mood and affect were stable, but he seemed preoccupied. *Id*. Dr. Schwarz next saw Claimant on January 4, 2002, at which time his mood and affect were stable. *Id.* at 14. On April 12, 2002, Dr. Schwarz noted that Claimant's mood had decreased, his symptoms of anxiety had returned, and he demonstrated a lack of concentration. *Id*. On that date, he discontinued the Serzone because "[Claimant's] dysphoria had continued and [his] concern over possible liver damage from Serzone," and he was started on Wellbutrin. *Id*. Dr. Schwarz next saw Claimant on June 12, 2002, and noted that Claimant was depressed, angry, and demoralized because his disability benefits had been reduced. *Id.* at 14-15. On August 13, 2002, Claimant's mood and affect were stable, but Dr. Schwarz noted that he was "under considerable situational stress secondary to any disability claim." *Id.* at 15. Dr. Schwarz continued Claimant's prescription for Neurontin, which was originally prescribed by Dr. Estores. *Id.* at 15-16. On October 8, 2002, Claimant was "irritable but in good control" and he "continued to feel stress by his disability." *Id*. On December 20, 2002, Claimant's affect was irritable and he was "totally overwhelmed by his workers' comp situation." *Id.* at 16. Dr. Schwarz increased the Neurontin prescription. *Id*. Dr. Schwarz's last appointment with Claimant was February 21, 2003. On that date, Claimant was "irritable, angry, and depressed secondary to inability to work. Pain and increased [sic] self-esteem." *Id*.

Dr. Schwarz testified about the initial status examination, noting that Claimant's affect was extremely tense, his mood was depressed, he was feeling a great deal of distress, depression and anger, and that there were no signs of psychosis. *Id.* at 50. His DSM-IV diagnosis was adjustment disorder with depressed and anxious mood, which he did not render until after the second or third appointment. *Id*. Dr. Schwarz testified that, according to his history, Claimant has not had any violent episodes in his life. *Id.* at 54. Dr. Schwarz stated that Claimant's loss of ability to work and his reduced benefits have been major stressors. *Id.* at 51. He explained that "I've always seen my role in [Claimant's] treatment as one who might help to stabilize him and cool things down and put out the fire in him." *Id.* at 53.

Dr. Schwarz testified that Claimant drives himself to his appointments, which is about an one-hour drive. *Id.* at 47. He also testified that Claimant's speech has been coherent during every appointment and that his affect has been "appropriate to his situation and the setting. However, his setting [sic] was quite intense and unstable." *Id.* at 47-48.

Dr. Schwarz testified that there are no long-term physical effects as a result of the extended use of Wellbutrin, Zyprexia, or Neurontin. *Id.* at 30-31. He testified that Zyprexia is a "very powerful, major tranquilizer and the dosages that [Claimant] is taking are best suited for somebody that is fragile and in danger of potentially harming himself or others." *Id.* at 49.

Dr. Schwarz opined that Claimant has a severe psychiatric impairment secondary to his work-related accident. *Id.* at 17. Dr. Schwarz testified that Claimant's chronic pain and inability

to work his usual and customary job have made him "angry and rageful," and that he has a very low frustration tolerance level, resulting in an inability to function with other people. *Id.* at 17-18). He opined that Claimant cannot function in a work setting. *Id.* at 18.

Dr. Schwarz testified that:

> [W]hat I see [in Claimant] is a man who is very irritable, affectively is relatively unstable, to put it mildly, frequently depressed, and struggling with issues that have to do with working at a level that he perceives, whether rightly or wrongly, that he perceives and is convinced of as being significantly below his level of expertise and work ability.
>
> And I think that's probably the biggest burden with this man. As I said, some people can re-invent themselves easily, they can develop new strengths. [Claimant] is having a great deal of difficulty.
>
> Now, that may seem to you or I a fabrication or malingering or not a significant problem, but for many people it is as disabling as a physically demonstrable pathology.

Id. at 59-60. Further, Dr. Schwarz testified that Claimant has been unable to adjust to his physical limitations, and that he deals with his limitations through anger, suspicion, and depression. *Id.* at 18.

Dr. Schwarz reviewed the November 18, 2001, May 12, 2002, and September 30, 2002 labor market surveys and concluded that none of the positions in those surveys are suitable for Claimant. *Id.* at 20-27. Dr. Schwarz stated that Claimant cannot perform a customer service or sales position due to his very low frustration tolerance level. *Id.* at 19. He also stated that Claimant cannot perform an armed guard position because of his very violent fantasies of harming people. *Id.* at 19-20. He noted that Claimant used to make considerably more than seven dollars an hour, and that dropping his salary would "represent quite a significant ego blow that I don't think he'd be able to tolerate." *Id.* at 21. He testified that Claimant is "suffering from such a degree of anxiety, recurrent depression, [and] demoralization," that Claimant is not capable of reinventing himself and finding a new career at this point. *Id.* at 24. Dr. Schwarz also reviewed the letters from Mr. Bilski to Claimant's counsel dated February 8, 2003, February 13, 2003, and March 3, 2003, and concluded that none of the positions in those letters are suitable for Claimant. *Id.* at 27-30. He explained that "these jobs are not in a necessarily difficult area, but for [Claimant] I think these jobs would just be overwhelming." *Id.* at 29. Yet, in regards to the February 13, 2003 letter, he later testified that there is no psychiatric reason that Claimant could not work for Prezant Iron Works as a welder or Dayton Granger as a primer. *Id.* at 57. However, he also testified that Claimant cannot perform these jobs because "he doesn't feel that he is - - that that's appropriate for him to do and that doesn't mean that he is malingering; it means he really hasn't been able to retrain himself in a different work setting, and that's the problem here." *Id.* at 63. He also stated that he would need to know more about the customer interaction, supervision, and stress level of these jobs before he could determine whether they are appropriate for Claimant. *Id.* at 72-73. Dr. Schwarz explained that "it's not

that he doesn't want to work; he does want to be able to work. But he hasn't been able to, because it means not being who he imagines that he was and who he wants to be." *Id.* at 64. He testified that Claimant sees these jobs as "beneath him and that's the problem he faces. That's what he is dealing with and that's what's causing him so much anger, depression and potentially explosive behavior." *Id.* at 67. Dr. Schwarz also testified that he would not recommend that Claimant work where he would have to interact with truck drivers and report to an authority figure. *Id.* at 65-66.

Dr. Schwarz explained that he did not respond to Mr. Bilski's requests for approval/disapproval of the jobs in the labor market surveys because he felt that any comments on the jobs would place him in an "awkward and compromising position" and "would make it more difficult or impossible for me to be his treating psychiatrist." *Id.* at 54-55. Also, Dr. Schwarz testified that he has not discussed specific jobs with Claimant, but "what he seems to be pulling for is something that would provide him with an equivalent or approximate close equivalent to his previous income and a job that will provide him with the kind of work independence and to his mind esteem that he had in his previous job." *Id.* at 62.

Dr. Schwarz testified that he has not reviewed any medical records from Drs. McAuliffe, Miot, Kessler, Cantor, Purita, Zislis, or Milowe. *Id.* at 38-41. He also has not reviewed the deposition testimony of Claimant. *Id.* at 70. He testified that the historical information in his notes came from Claimant himself. *Id.* at 43-44.

Dr. Schwarz testified that "there were times when I was concerned about the possibility that [Claimant] was experiencing psychotic episodes." *Id.* at 48. Dr. Schwarz explained, in defining psychosis, that: "[Claimant] was so distraught and overwhelmed by the situation, as he perceived it, that he was confusing his own inner concerns, impulses and issues, with what was going on outside of him in the external world; and that he was projecting his own rage and frustration on to others and perceiving it as if others were out to harm him." *Id.* Dr. Schwarz testified that there was a time when he was concerned about Claimant's potential for violence directed at himself or at others, but that he never felt it was necessary to Baker Act him because just his words were threatening. *Id.* at 48-49. Dr. Schwarz does not feel that Claimant is dangerous, but that "there are some times when he becomes so frustrated, enraged and angry, that if provoked further, that he could be dangerous," which is one reason that he is not recommending that Claimant work somewhere that people skills and diplomacy are required. *Id.* at 53-54.

Dr. Schwarz testified that Claimant's psychiatric problem is not a long-term character problem because he recited his history and he "enjoyed many of the things he was involved with and was proud of what he was capable of doing." *Id.* at 70.

Hospital Records

Boca Raton Community Hospital

Claimant was admitted to Boca Raton Community Hospital via the emergency room on October 4, 1987. (EX 1, V7, T5). Claimant was assaulted by several men, and suffered facial

lacerations. The x-rays and clinical evaluations did not reveal any fractured bones. *Id.* at 13, 26. Claimant was released from the hospital on October 6, 1987. *Id.* at 11, 18.

North Broward Medical Center

On October 25, 1988, Claimant was seen in the emergency room of the North Broward Medical Center. (EX 1, V1, T2). According to the records, Claimant was in a motor vehicle accident on October 24, 1988, and was at the emergency room complaining of low back pain radiating down the left leg and foot *Id.* at 82. The x-rays of Claimant's dorsal spine and left femur were performed, and both revealed no acute traumatic bony lesions. *Id.* at 84.

West Boca Medical Center

On January 22, 1993, Claimant saw Dr. Joseph Purita, complaining of lower back pain with radiation of pain down his left leg for about two months. (EX 1, V1, T4, p. 96). Dr. Purita noted that Claimant had not responded to conservative treatments. On examination, Dr. Purita noted generalized tenderness involving the lumbar spine, a positive straight leg raising test on the left side at approximately thirty degrees and a positive sciatic strumming test. The MRI revealed a herniation at the left L5-S1 level. Claimant was admitted to the hospital on that date and Dr. Purita performed a lumbar laminectomy, diskectomy, and foraminotomy at L5-S1. *Id.* at 97, 107. Claimant was discharged from the hospital on January 24, 1993, with instructions not to bend, twist, or engage in heavy lifting. *Id.* at 95.

American Maritime Officers Medical Center

Claimant was examined on June 16, 1994 by Dr. Stradford Draesel. (EX 1, V5, T1, p. 8). He was "found to be in good health" and "acceptable for work (mechanic) at Crowley." *Id*. On Crowley's Post-Offer Medical Questionnaire, Claimant indicated that he had not been treated for a sickness or injury, examined by a physician, or admitted to a hospital in the past seven years. *Id.* at 10. He also indicated that he did not have any physical limitations and that he had never injured his neck or back. *Id*. X-rays of Claimant's lumbar and spine were taken, but they were unreadable. *Id.* at 13.

Boca Raton Orthopedic Group, Inc.

Dr. Joseph R. Purita treated Claimant for back pain in 1997. (EX 1, V1, T3). On October 16, 1997, Claimant complained of low back pain radiating to his left leg. *Id.* at 87. Dr. Purita noted that Claimant had an injury on July 16, 1997, and that either Dr. Strain or Dr. Linn recommended cortisone injections. On examination, Claimant did not have increased pain with flexion or extension of the spine, there was no particular pain on range of motion of either hip, and the straight leg raising test and the sciatic strumming test were negative. Dr. Purita prescribed Relafen and gave Claimant a lumbotrain brace. Claimant had a follow-up visit with Dr. Purita on November 10, 1997. *Id*. He reported continued discomfort in his back and Dr. Purita recommended that Claimant have the third epidural. During the final visit on December 15, 1997, Claimant reported little back discomfort. *Id.* at 88.

HealthSouth

The record also includes Claimant's 1997 physical therapy records for his right thumb and back. (EX 1, V1, T5). The intake form and the first therapy session indicate that Claimant injured his back when he fell in a hole in July of 1997. *Id.* at 155, 159.

Stanger Health Care Centers

Claimant was seen by a chiropractor at Stanger Health Care Centers on January 31, 1998. (EX 1, V5, T2). Claimant complained that on January 30, 1988, he was riding his bike, he bent over and coughed, and felt a pain in his back. He described the pain as a sharp stabbing feeling with no radiation. He stated that everything aggravated the pain, and that there was a constant pain in his mid back, around the T6-7 region. On examination, Claimant's lumbar range of motion was limited, and the lumbar orthopedic tests revealed a positive Valsalva's and Bekhterev's bilaterally. Also, palpation revealed myospasm and tenderness bilaterally at the T5 through T8 levels, with decreased range of motion in the thoracolumbar spine. It was recommended that Claimant undergo therapeutic manipulation and adjunctive therapies. Claimant did not return to Stanger Health Care Centers.

Coral Springs Medical Center

On May 1, 1998, Claimant was treated at the emergency room because of an injury to his right shoulder. (EX 1, V7, T3). The x-ray revealed no fracture or dislocation of the right shoulder. *Id.* at 13. The discharge summary indicated that the shoulder pain was due to tendinitis, bursitis, or an injury to the rotator cuff, and recommended that Claimant rest his shoulder and follow-up with an orthopedist. *Id.* at 8.

Employment Records

Claimant applied for a position with Crowley on June 16, 1994. (EX 1, V3, T1, p. 11). On his application, he reported that he worked for the following companies: International Warehouse Services from 1992 to present; Bootleg Trailer Inc. from 1989 to 1992; Industrial Models from 1988 to 1989; and Hoover Irrigation from 1985 to 1988. *Id.* at 12. He also reported that he had completed the fourth year of high school and attended Carrier Corp. Welding School in New York. *Id.* at 13. Claimant began working for Crowley on June 21, 1994. *Id.* at 254. Claimant worked every week from June 21, 1994 to April 6, 1995. *Id.* at 254-262. Claimant was off sick April 7, 10-12 and 25, 1995. *Id.* at 262-263. Claimant worked April 14, 17- 20, 24, 26-28, May 1-12, 29-31, and June 2, 1995. *Id.* Claimant did not work June 3, 1995 to December 3, 1995. *Id.* at 263-264. Claimant next worked from December 4, 1995 to October 31, 1996. *Id.* at 264-272. Claimant did not work November 1, 1996 to October 6, 1997. *Id.* at 272-273. Claimant then worked October 7, 1997 to May 1, 1998. *Id.* at 273-278. Claimant did not work May 2, 1998 to November 9, 1998. *Id.* at 278. Finally, Claimant worked November 10, 1998 to March 23, 1999, March 30-31, 1999, and April 1, 1999. *Id.* at 278-282. According to these records, Claimant worked a total of 136.5 weeks, or 2.65 years.

The record also contains Claimant's daily vehicle repair logs. (EX 1, V3, T2).

Vocational Evidence

Theodore S. Bilski

Theodore S. Bilski prepared four labor market surveys for Claimant. (EX 1, V6, T1). The first labor market survey was dated November 18, 2001. *Id.* at 159-164. Mr. Bilski indicated that he was unable to conduct a vocational assessment of Claimant, so Claimant's background information was procured from "available documentation, such as prior labor market surveys, treating physician office notes, etc." *Id.* at 159. Mr. Bilski summarized Claimant's medical history as including back surgery in 1991, left shoulder acromioplasty in 1995, right thumb fusion in 1996 or 1997, left knee arthroscopy in 1997, and right shoulder acromioplasty in 1998. He indicated that Drs. Kessler, Miot, Zislis, and Schwarz were Claimant's treating physicians, although he only summarized Dr. Kessler's medical records. Mr. Bilski stated that Claimant completed the twelfth grade and received his G.E.D. in 1976, and then attended six months of trade school (welding) in 1979 at Carrier Corporation. Regarding Claimant's work history, Mr. Bilski stated that he had worked for Crowley for five years as a trailer mechanic, for International Warehouse Service for three years as a race car mechanic/crew chief, for Bootleg Trailer Inc. for three years as a trailer maker, for Industrial Models for one and one-half years as a model building maker, for Hoover Irrigation for four years as a pipe welder, and he had also worked as a dairy farmer. Mr. Bilski stated that the "[a]vailable documentation places [Claimant] as being capable of participating within light-duty physical demand level employment opportunities." *Id.* Mr. Bilski identified thirteen jobs for Claimant. The first job identified was as a telephone fund raiser, with a starting wage of $9.00 an hour. Mr. Bilski scheduled Claimant to begin working for this employer on November 30, 2001. Mr. Bilski identified four jobs as a service writer for automobile repair shops, which involved the preparation of service estimates and actual billings for services required. These positions had a starting wage of $8.00 to $8.50 an hour. Mr. Bilski identified one position as a warehouse helper, which required assisting with warehouse responsibilities, including the operation of a forklift. The starting wage for this position was $8.00 an hour. Mr. Bilski identified two positions as an unarmed security officer, which required a Class D unarmed security officer license (Employer would assist Claimant in obtaining the license), with a starting wage of $7.25 to $8.50 an hour. One position as a customer service representative was identified, which involved attending to customer needs of an executive Miami aviation unit. This position had a starting wage of $6.75 an hour. One position as a dispatcher trainee was identified, which would require Claimant to obtain a telecommunications trainee academy certification. This position had a starting wage of $7.00 an hour. Mr. Bilski identified one position as a parts coordinator, which involved the maintenance of a parts room, accounting for inventory, and reconciling accounts. The starting wage for this position was $10.00 an hour. Mr. Bilski identified one position as a cashier/manager trainee, which involved accepting money for services, providing change, accounting for daily sales receipts, and assuring customer satisfaction upon the completion of services. This position had a starting wage of $7.00 an hour. Finally, Mr. Bilski identified one position as a sales person, which involved greeting customers, providing customers with information regarding sales, and processing paper work regarding purchases. The starting wage for this position was $7.00 an hour.

Mr. Bilski prepared a second labor market survey dated February 4, 2002. *Id.* at 133-139. The educational, employment, and medical histories remained unchanged from the previous labor market survey. Mr. Bilski noted that the documentation indicated that Claimant could perform light-duty work, which encompassed lifting no more than twenty pounds, and that all of the identified positions were within twenty-five miles of Claimant's residence. Mr. Bilski identified fifteen positions for Claimant. Three of the positions (warehouse helper and unarmed security officer) were previously identified in the November 18, 2001 labor market survey. The survey included a third unarmed security officer position with a starting wage of $8.00 an hour. Mr. Bilski identified a purchasing agent position, which involved controlling inventory and purchasing operations with vendors. This position did not require lifting more than ten pounds, and the starting wage was $13.00 an hour. Mr. Bilski identified four positions as a welder, which involved welding fencing, aluminum, wrought iron furniture, or stick welding on ships. These positions did not require lifting more than twenty pounds, and the starting wages were $9.00 to $10.50 an hour. Mr. Bilski identified a position as a teleservice representative, which involved handling inbound and outbound calls at a service center. The position did not require lifting more than five pounds, and the starting wage was $9.75 an hour. One position as a night audit clerk was identified, which involved the performance of night auditing duties at a hotel. This position did not require lifting more than five pounds, and the starting wage was $8.50 an hour. Mr. Bilski identified one position as a floor waxer. This position did not require lifting more than twenty pounds without assistance, and the starting wage was $7.00 an hour. Mr. Bilski identified a position as an inbound sales representative, which involved answering inbound calls from customers to upsell company products and assist customers in problem solving. This position did not require lifting more than five pounds, and the starting wage was $8.75 an hour. Finally, Mr. Bilski identified one position as a merchandiser, which involved rotating products and maintaining the inventory. This position did not require lifting more than ten pounds, and the starting wage was $8.50 an hour.

The third labor market survey prepared by Mr. Bilski was dated May 12, 2002. *Id.* at 110-117. The educational, employment, and medical histories remained unchanged. Mr. Bilski identified fifteen positions for Claimant, which he categorized as: service writer positions, production/supervisory positions, sales related positions, and other types of positions. Mr. Bilski identified two service writer positions, which involved writing work orders for repairs and warranty services, and documenting and maintaining service and repair records. These positions did not require lifting more than ten pounds, and the starting wages were $8.00 to $10.00 an hour. Mr. Bilski identified one position as a fleet supervisor, which involved scheduling and monitoring maintenance programs for all company vehicles, maintaining parts inventory, facilitating in safety training, and insuring OSHA compliance. This position did not require lifting more than five pounds and the starting wage was $9.00 to $14.00 an hour. One position as a production line supervisor was identified, which involved supervising the bottling production line and operating production equipment, computers, and machinery used in the bottling process. This position did not require lifting more than ten pounds, and the starting wage was $10.00 to $14.00 an hour. Mr. Bilski identified a position as a sewing equipment operator, which did not require lifting more than twenty pounds, and the starting wage was $7.50 to $8.50 an hour. Mr. Bilski identified a position as a solderer, which required surface mount soldering on PC boards, and reading blueprints and schematics. This position did not require lifting more than ten pounds, and the starting wage was $7.50 to $9.50 an hour. One shipping

and handling position was identified, which required handling of incoming and outgoing transactions and maintaining a record of invoices. This position did not require lifting more than thirty pounds, and the starting wage was $7.25 to $10.00 an hour. Mr. Bilski identified two retail sales positions. These positions involved assisting customers, operating an electronic cash register, presenting merchandise, and controlling inventory. These positions did not require lifting more than twenty pounds, and the starting wages were $8.00 to $10.25 an hour. Mr. Bilski identified five telephone sales and/or marketing representative positions. These positions involved telephonic sales of company sales and services to residences and businesses, or handling inbound and outbound calls a service center. These positions did not require lifting more than five pounds, and the starting wages were $7.00 to $14.00 an hour. Finally, Mr. Bilski identified a position as a water meter reader. This position did not require lifting more than ten pounds, and the starting wage was $9.00 to $11.00 an hour.

Mr. Bilski prepared a fourth labor market survey dated September 30, 2002. *Id.* at 69-81. Again, the educational, employment, and medical histories remained unchanged from the prior labor market surveys. Mr. Bilski identified twenty-nine positions, which he categorized as: service writer positions, telephone sales/marketing positions, sales related positions, appointment setter positions, cashier/counter positions, customer service/front desk positions, and other types of positions. Mr. Bilski identified four service writer positions, which involved writing work orders for general auto repairs and warranty service orders. These positions did not require lifting more than ten pounds, and the starting wages were $7.25 to $10.25 an hour. He also identified a position as a fleet service writer, which had a starting wage of $8.00 to $10.50 an hour. Mr. Bilski identified four telephone sales/marketing positions, which involved contacting residences and/or businesses regarding various products. These positions did not require lifting more than five pounds, and the starting wages were $7.00 to $12.00 an hour. Mr. Bilski identified seven sales representative positions, four of which involved selling automobiles. These positions did not require lifting more than five pounds, and the starting wages were $7.00 to $10.75 an hour. One appointment setter position was identified, which involved setting appointments for sales personnel to meet with potential customers. This position did not require lifting more than five pounds, and the starting wage was $7.00 to $9.25 an hour. Mr. Bilski identified five cashier/counter positions, which involved taking orders, attending to cash register purchases, making change, and answering customers' questions. These positions did not require lifting more than fifteen pounds, and the starting wages were $6.00 to $9.50 an hour. Mr. Bilski identified two customer service/front desk positions, which involved greeting customers, answering common questions, and checking guests into and out of the hotel. These positions did not require lifting more than five pounds, and the starting wages were $7.50 to $9.75 an hour. One position as a portrait studio associate was identified, which involved taking photographs and presenting portrait order information to customers. The starting wage for this position was $7.50 to $9.50 an hour. Mr. Bilski identified two positions as a call center representative, which involved answering inbound telephone calls from customers, troubleshooting issues which the customer is experiencing, and documenting the calls in a database. These positions did not require lifting more than five pounds, and the starting wages were $7.00 to $11.00 an hour. Mr. Bilski identified one position as a collections/customer service representative, which involved calling for legal collections with primary retail credit card holders. This position did not require lifting more than five pounds, and the starting wages were $8.00 to $9.00 an hour. Finally, Mr.

Bilski identified a fleet supervisor position which was previously identified in the May 12, 2002 labor market survey.

Mr. Bilski also sent Claimant's counsel four letters identifying positions and scheduling interviews for Claimant. The first two letters, dated February 6 and February 8, 2003, identified four positions for Claimant and scheduled interviews for Thursday, February 13, 2003. *Id.* at 18-21, 28-31. The first position was as a welder/fabricator, which involved welding wrought iron furniture. This position was previously identified in the February 4, 2002 labor market survey. The second position was as a service writer. This position did not require lifting more than ten pounds and the starting wage was $7.00 to $9.25 an hour. The third position was as a primer, which involved priming avionic parts. This position did not require lifting more than twenty pounds, and the starting wage was $7.25 to $8.50 an hour. The fourth position was as a route driver, which involved delivering business cards, stamps, and other printed materials. This position did not require lifting more than twenty pounds, and the starting wage was $6.75 to $8.25 an hour. Mr. Bilski also indicated in these letters that Claimant did not attend the interviews that he had scheduled in a letter dated February 2, 2003.[28] The first position was as a paper cutter, which did not require lifting more than twenty pounds and had a starting wage of $7.00 to $10.00 an hour. The second position was as a toll booth attendant, which did not require lifting more than ten pounds and had a starting wage of $7.25 to $8.50 an hour. The third position was as a sandwich maker/cashier, which did not require lifting more than ten pounds and had a starting wage of $6.75 to $8.25 an hour. The final position was as a service writer, which had a starting wage of $7.75 to $9.00 an hour. Mr. Bilski also attached letters from these employers stating that Claimant did not show up for the interviews. (EX 1, V6, T1, pp. 32-39).

Mr. Bilski sent another letter to Claimant's counsel on March 3, 2003. *Id.* at 44-49. He identified four positions for Claimant and scheduled interviews for Thursday, March 6, 2003. The first position was as a cashier/inventory clerk, a position which did not require lifting more than twenty pounds. The second position was as a floating monitor, which involved overseeing and supervising clients utilizing the shelter. This position did not require lifting more than ten pounds. The third position was as a order picker/packer, which involved picking and packing customer orders. This position required infrequent lifting up to twenty-five pounds. The final position was as a ticket taker or usher at a movie theater. These positions did not require lifting more than ten pounds. Mr. Bilski's letter does not identify the starting wages for these positions. The record also includes letters from the second and third employers indicating that Claimant did not attend the scheduled interviews.

Mr. Bilski sent a letter to Claimant's counsel on March 13, 2003. *Id.* at 1-3. He identified six positions for Claimant and scheduled interviews for two of the positions on Thursday, March 20, 2003. Mr. Bilski identified two deli clerk positions, which did not require lifting more than thirty pounds. Mr. Bilski identified a material cutter position, which did not require lifting more than thirty pounds. He identified a processor/sorter position, which involved sorting aluminum cans, packing cans, and other preparation. This position did not require lifting more than thirty pounds. He also identified a food cart attendant position, which involved selling sandwiches from a food cart at office buildings. This position did not require lifting more than

[28] Mr. Bilski's letter dated February 2, 2003 is not in the record.

fifteen pounds. The final position identified was as a gatehouse keeper, which involved allowing vehicles to enter the premises after verifying the driver's identification. This position did not require lifting more than fifteen pounds. The letter does not indicate the starting wages for these positions.

Leslie Delman

Leslie Delman performed a vocational evaluation on Claimant on February 28, 2003 and her findings are summarized in a report dated March 18, 2003. (CX 1, V1, T2). Ms. Delman noted Claimant's personal history, work history, and the events surrounding his four alleged work-related injuries. *Id.* at 1-2, 7-8. Ms. Delman reviewed the following records: medical records from Drs. Miot, Feanny, Easklick, Kessler, Cantor, and Schwarz, the depositions of Drs. Kessler, Cantor, and Schwarz, physical therapy records, and an MRI. *Id.* at 2. Ms. Delman summarized Claimant's symptoms as follows:

> [Claimant] describes his current symptoms as constant bilateral shoulder burning which radiates down both arms into both hands causing pain and burning. He indicates that reaching with either arm causes an increase of the burning sensation in his hands. He reports that repetitive movement, handling, grasping, with either hand causes an excruciating burning sensation in his hands and shoulders. He relates that any particular activity may lock up either shoulder. He notes that his right thumb is shorter and does not wrap around items causing him to drop things. He relates he feels constant lower back pain radiating down his left leg, around his groin area and down his left leg into his left foot causing a burning sensation, along with a needles and pins sensation with [sic] is aggravated with activities such as bending, stooping, sitting, standing, and driving.... He explains that he his able to sit for approximately 5 to 20 minutes and then has to stand up and stretch due to left leg, groin, and back pain.[29] He indicates that he is able to stand for approximately 5 to 15 minutes and then he feels left leg burning causing him to lay down. He reports being able to walk for approximately one hour and then he has to sit down and recline because of pain radiating into his back and down into his leg pain. He notes being able to drive for approximately one hour, but with a lot of pain radiating down from his back down into his left leg.

Id. at 6. Ms. Delman also noted that Claimant mows the lawn, washes the car, goes to doctor's appointments, transports his children from school, and once a week visits a friend who works in a car shop. *Id.* at 7. Also, Claimant told Ms. Delman that he had five DUIs in the early 1980s, and was incarcerated for seven months. *Id*. He also reported that he was convicted of two assaults, for which he served a short amount of jail time, he was convicted of marijuana possession, but did not serve any jail time, and he was convicted of a DUI on a boat in 1993 and served one day in jail. *Id*.

[29] Ms. Delman noted in her report that the evaluation lasted four and one-half hours, and that Claimant stood up and stretched approximately every twenty minutes, and took several short breaks. (CX 1, V1, T2, p. 10).

Ms. Delman administered three vocational tests: the Wonderlic Basic Skills Test, the Wonderlic Personnel Test, and the Purdue Pegboard Test. *Id.* at 9. The results of the Wonderlic Basic Skills Test indicate that Claimant's reading and math skills are below the sixth grade level. *Id*. The results of the Wonderlic Personnel Test indicate that Claimant "possesses intelligence which places him in the low average category as compared to a norm group of individuals his age," with his I.Q. reported as 86. *Id*. The results of the Purdue Pegboard Test indicate that Claimant "has poor ability working with his hands manipulating small objects in a timed assembly setting." *Id.* at 10. Ms. Delman also noted that he had difficulty using his right hand. *Id*. Ms. Delman stated that a transferable skills analysis was performed and that no job matches were identified. *Id*. Ms. Delman concluded that, based on Claimant's age, education, ability to perform his previous work, transferable skills, and physical restrictions from the physicians, Claimant is "not able to return to gainful employment in the open labor market on an uninterrupted basis as a result of his work-related injuries." *Id*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In order to qualify for permanent total disability benefits under the Act, it must be demonstrated that: (1) the claimant was engaged in "maritime employment," 33 U.S.C. § 902(3); (2) an employer-employee relationship existed between the claimant and the employer, §§ 902(2), 902(3), 902(4); (3) the claimant's injury was causally related to his employment, § 902(2); and (4) the claimant's injury rendered him permanently and totally unable to perform his job, §§ 902(10), 908(a). *See, e.g.*, *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 58 (2d Cir. 2001). Claimant and Employer stipulated that Claimant was engaged in maritime employment and that an employer-employee relationship existed. (TR 5). Therefore, the only issues are whether Claimant's back and psychiatric injuries are causally related to his employment and whether his right thumb, left shoulder, and right shoulder injuries, and/or his back injury or psychiatric condition rendered him permanently and totally unable to perform his job.

Section 20(a) Presumption

Section 20(a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, 174 (1989), *aff'd*, 892 F.2d 173 (2d Cir. 1989). Once the claimant has invoked the presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). Section 20(a) only provides a presumption that aids a claimant in establishing that a harm constitutes a compensable injury under the Act; it does not assist a claimant in proving that any disability resulting from a work injury was in fact permanent. *Holton v. Independent Stevedoring Co.*, 14 BRBS 441, 443 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112, 119 (1979).

A. Back Injury

In order to invoke the Section 20(a) presumption, a claimant must first prove his *prima facie* case. A claimant proves his *prima facie* claim for compensation by establishing two elements: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work that could have caused the harm or pain. *United States Industries/Federal Sheet Metal, Inc. v. Director, OWCP [Riley]*, 455 U.S. 608, 615 (1982); *Merrill*, 25 BRBS at 144; *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326, 331 (1981). A work-related aggravation of a pre-existing condition is an injury pursuant to section 2(2) of the Act. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556, 564 (1979), *aff'd sub nom., Gardner v. Director, OWCP*, 640 F. 2d 1385 (1st Cir. 1981); *Johnson v. Ingalls Shipbuilding*, 22 BRBS 160, 162 (1989. Moreover, the employment-related injury need not be the sole cause or primary factor in a disability for compensation purposes. If an employment injury aggravates, accelerates or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable. *See Port of Portland v. Director, OWCP (Ronne)*, 932 F.2d 836, 24 BRBS 137, 140-141 (CRT)(9th Cir. 1991); *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1, 2 (1986); *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520, 521-522 (1981), *aff'd*, 694 F.2d 327 (4th Cir. 1982); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986); *Morgan v. General Dynamics Corp.*, 15 BRBS 107, 109 (1982); *Primc v. Todd Shipyards Corp.*, 12 BRBS 190, 193 (1980). However, if the subsequent progression of the condition is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, the employer can be relieved of liability for any disability attributable to the intervening cause. *Jones v. Director, Office of Workers' Compensation* Programs, 977 F.2d 1106, 1111 (7th Cir. 1992); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1051 (5th Cir. 1983);*Cyr v. Crescent Wharf &Warehouse Co.*, 211 F.2d 454, 456 (9th Cir. 1954);*Marsala v. Triple A South*, 14 BRBS 39, 42 (1981). The claimant does not have to present medical evidence that working conditions in fact caused his injury; he only needs to produce "*some* evidence tending to establish" both elements in order to invoke the presumption. *Brown v. I.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990)(emphasis in original).

First, Claimant has established that he suffered a physical harm. Claimant testified that he has been experiencing low back pain since early 1997. (EX 1, V2, T1, p. 30). The 1997 MRI revealed a bulging disc at the L4-5 level and the 2000 MRI revealed disc herniations at the L4-5 and L5-S1 levels. (EX 1, V1, T7, p. 292; EX 1, V1, T1, p. 76). Dr. Cantor performed two fusions on Claimant's lumbar spine to alleviate his back and leg pain, and Dr. Teman recently diagnosed Claimant with failed back syndrome. (EX 1, V1, T1, pp. 14, 39; EX1, V7, T4, p. 11).

Second, Claimant has established that his work conditions could have caused his back injury. Claimant and Mr. Poling testified that the trailer mechanic position involved a lot of bending, stooping, kneeling, and squatting, and that they would have to lift up to four hundred pounds. (TR 169-170, 357). Also, they testified that the mechanics would climb into and jump

out of trailers up to one hundred times per day.[30] (TR 170, 249, 357). Claimant testified that while working for Employer, he repeatedly fell off of trailers and repeatedly hit his back on the underside of trailers. (TR 188-189, 196). Claimant recounted a specific instance in October of 1997 in which he hit his back on the underside of a trailer and Dr. Purita prescribed an epidural injection to treat the pain. (TR 188-189). Further, Dr. Cantor testified that Claimant's back condition is ongoing and progressive, and that repeated twisting, falling, and lifting could aggravate his condition. (EX 2, V2, T2, p. 187). I find that Claimant's work conditions could have caused or aggravated his pre-existing back condition. Therefore, I find that Claimant has established a *prima facie* case and that the Section 20(a) presumption has been invoked.

Since the presumption has been invoked, the burden now shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, aggravate, or accelerate his condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 273 (1989); *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 77-78 (1991). Substantial evidence is such relevant evidence as a "reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477 (1951)(citation omitted); *see also O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506, 508 (1951); *Phillips v. California Stevedore & Ballast Co.*, 9 BRBS 13, 14 (1978).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). *Smith v. Sealand Terminal*, 14 BRBS 844, 846 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-145 (1990). The employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act. *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984). When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, the employer must establish that the claimant's condition was not caused or aggravated by his employment. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85, 86 (1986). Further, in a case where the employer alleges a subsequent intervening cause of the claimant's condition, the employer may also rebut the presumption by proving that the disabling condition was not the natural and unavoidable result of the work injury. *White v. Peterson Boatbuilding Co.*, 29 BRBS 1, 9 (1995).

[30] Claimant, Mr. Poling, Mr. Leyva, and Mr. Meridth testified that there were ladders available for the trailer mechanics to use, but Claimant and Mr. Poling testified that the ladders were "junky" and "rickety." (TR 249, 354-355). Also, Claimant, Mr. Poling, and Mr. Leyva testified that the trailer mechanics usually climb into and jump out of the trailers rather than use a ladder. (TR 249, 354-355, 389). It is clear that ladders were available but not frequently used, and it will not be further addressed under the causation issue.

Employer argues that the work conditions did not aggravate Claimant's pre-existing back condition, but rather that his current condition is the result of the natural progression of his pre-existing back condition. *See Closing Brief for Employer/Carrier*, pp. 16, 27. Claimant had his first back surgery in 1993, over one year before he began working for Employer. (EX 1, V1, T4, pp. 97, 107). Also, Claimant allegedly injured his back in two non-work related incidents. First, Claimant fell into a hole in 1997, after which he complained of back pain, and Dr. Linn opined that he had L5 radiculpathy secondary to the fall. (EX1, V1, T7, p. 292). Second, Claimant was riding his motorcycle in 1998, when he coughed and felt a sharp pain in his back. (EX 1, V5, T2, p. 6). Employer argues that any injury to Claimant's back is related to one or both of these incidents, which are unrelated to his work for Employer. (TR 15). Dr. Reitman reviewed all of Claimant's medical records and opined that his current back condition is not work related. Rather, he explained that Claimant "is experiencing the manifestation of the natural progression of his [longstanding, preexisting problems]." (EX 1, V1, T6, p. 275). He attributed a portion of Claimant's deterioration to his 1993 back surgery and 1997 fall. An unequivocal opinion, given to a reasonable degree of medical certainty, that the employee's injury is not work-related is sufficient to rebut the Section 20(a) presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 41 (2000). Further, the medical records from Dr. Linn reveal that he recommended epidural injections to relieve Claimant's back pain on October 7, 1997, the morning that Claimant returned to work after his right thumb injury. (EX 1, V1, T7, p. 293). This is contrary to Claimant's testimony that Dr. Purita prescribed the epidural injections after Claimant injured his back at work in October of 1997. (TR 189). I find that the foregoing evidence severs the causal connection between Claimant's employment and his back injury. Therefore, I find that Employer has presented sufficient evidence to rebut the Section 20(a) presumption.

Once the Section 20(a) presumption is rebutted, it falls out of the case and the administrative law judge must then weigh all the evidence and resolve the case based on the record as a whole, with Claimant bearing the ultimate burden of persuasion. *DelVecchio v. Bowers*, 296 U.S. 280 , 286 (1935); *Universal Maritime Corporation v. Moore*, 126 F.3d 256, 262 (4th Cir. 1997); *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 700 (2d Cir 1982); *Hislop v. Marine Terminals Corp.*, 14 BRBS 927, 931 (1982). This rule is an application of the "bursting bubble" theory of evidentiary presumptions, derived from the United States Supreme Court's interpretation of Section 20(d) of the Act. *Del Vecchio*, 296 U.S. at 286; *see also Brennan v. Bethlehem Steel Corporation*, 7 BRBS 947 (1978)(applying *Del Vecchio* to Section 20(a)).

In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741, 742-743 (5th Cir. 1962). It is solely within the discretion of the administrative law judge to accept or reject all or any part of any testimony according to his judgment. *Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390, 395-396 (1979).

Claimant alleges that he injured his back in October of 1997, a few days after returning to work from his right thumb injury. However, the evidence of record does not support his assertion. Claimant testified that after his work-related injury he went to Dr. Purita, who prescribed epidural injections. (TR 189). Claimant did not report the alleged work-related

accident to Dr. Purita, but rather reported that he was injured on July 16, 1997. Dr. Purita prescribed Relafen and a lumbotrain brace. (EX 1, V1, T3, p. 87). Dr. Linn, who treated Claimant's knee after he fell in a hole in July of 1997, reported that Claimant complained of back pain on August 29, 1997. Dr. Linn reported that "[Claimant] had mentioned this previously, but he did not think much of it as it was somewhat recent from his surgery…. The pain that he is having now is very similar to the pain he had 6 to 7 years ago prior to his surgery. He did twist his back when he stepped in the hole." (EX 1, V1, T7, p. 291). After continued complaints of back pain, Dr. Linn prescribed three epidural steroids on October 7, 1997, the same day that Claimant returned to work after his right thumb surgery. (EX 1, V1, T7, p. 293). The medical evidence shows that Dr. Linn, not Dr. Purita, prescribed the epidurals to Claimant and that the back pain preceded any work-related injury in October of 1997. Further, neither Dr. Purita nor Dr. Linn opined that the October 1997 incident aggravated Claimant's pre-existing back problems, as they did not know of the alleged work-related accident. I find that Claimant's testimony alone cannot support a finding that he was injured in October of 1997 due to a work-related accident or that the accident aggravated a pre-existing condition. Therefore, I find that Claimant's back pain was not caused or aggravated by the alleged October 1997 work-related accident.

Claimant also testified that he repeatedly jumped out of trailers and hit his back on the underside of trailers, and that those incidents combined to cause a back injury. (TR 248). *See also Claimant's Closing Brief*, pp. 11, 21. Drs. Cantor and Reitman address Claimant's back condition. Dr. Cantor treated Claimant's back condition for about three years and Dr. Reitman evaluated Claimant's back condition on behalf of Employer. Interestingly, Dr. Reitman is the only physician who knew about Claimant's alleged work-related back injury.[31] Dr. Cantor testified that repeated lifting, twisting, or falling could have caused Claimant's back condition. He also testified that Claimant's back condition could have progressed without any exacerbating factors. However, Dr. Cantor testified that he could not opine as to the etiology of Claimant's back condition as he did not take a thorough history from Claimant or review the medical records. I find that Dr. Cantor's opinion is equivocal and does not support a finding that Claimant's back condition is related to his employment. Dr. Reitman examined Claimant and reviewed all of his medical records. Dr. Reitman opined that Claimant has a longstanding, degenerative back condition, and that Claimant is currently experiencing a manifestation of the natural progression of his condition. Further, Dr. Reitman stated that superimposed on Claimant's degenerative back condition are the 1993 back surgery and the July 1997 fall. Dr. Reitman concluded that Claimant's back condition is not related to his employment at Crowley. I find that Dr. Reitman's report is well-reasoned and supported by the medical evidence.

[31] Claimant filled out a Spine Clinic Medical Questionnaire for Dr. Cantor, and wrote that his back pain was the result of "moving stuff in the garage" (EX 1, V1, T1, p. 43). Claimant testified that "the garage" referred to Crowley's shop. (TR 289, 291). However, during Claimant's testimony at the hearing, he always referred to his workplace as the "shop" and not the "garage." (TR 166, 167, 168, 171, 175, 182, 183, 290). I find that Claimant did not report a work-related injury to Dr. Cantor when he wrote that he injured his lower back while moving stuff in the garage on the office questionnaire.

Finally, Claimant argues that the 1997 and 2000 MRIs reveal a deterioration of his back condition, which demonstrates that his employment aggravated his pre-existing back condition. *See Claimant's Closing Brief*, pp. 21-22. The 1997 MRI revealed a bulging disc at the L4-5 level and the 2000 MRI revealed disc herniations at the L4-5 and L5-S1 levels. Dr. Reitman interpreted the 1997 MRI as revealing disc protrusion at the L5-S1 level and no disc extrusion at the L4-5 level. (EX 1, V1, T6, p. 271). While Claimant's back condition did deteriorate at the L4-5 and L5-S1 levels, no physician has causally linked the deterioration of Claimant's back condition with his employment. Dr. Cantor stated that Claimant has an ongoing progressive back problem which could progress without any exacerbating factors, and he could not opine as to the cause of Claimant's back condition. Moreover, Dr. Reitman opined that Claimant's current condition is the result of a progressive back condition. As none of the physicians found that Claimant's current back condition was either caused or aggravated by his employment, Claimant has failed to carry his burden of production. Therefore, I find that Claimant's back injury is not a compensable work-related injury.[32]

B. Psychiatric Condition

It is well-established that work-related psychological impairments are compensable under the Act. *Director, OWCP v. Potomac Elec. Power Co. [Brannon]*, 607 F.2d 1378, 1382 (D.C. Cir. 1979); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 151 (1989); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340, 342 (1989); *Turner v. Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257 (1984). In order to invoke the Section 20(a) presumption, the claimant must establish a *prima facie* case by showing that he has a psychological impairment and that an accident occurred or working conditions existed which could have caused the impairment. In this case, it is undisputed that Claimant has a psychological impairment. Dr. Schwarz diagnosed Claimant with an adjustment disorder with depressed and anxious mood (CX 1, V1, T1, p. 50) and Dr. Milowe diagnosed Claimant with a chronic adjustment disorder with disturbance of emotions and conduct. (EX 1, V6, T5, p. 3). Also, Claimant has established that his work-related accidents could have caused his psychological impairment. Dr. Schwarz testified that Claimant's chronic pain and inability to work, both the result of his work-related injuries, have left him anxious, suspicious, and depressed. (CX 1, V1, T1, pp. 17-18, 24, 58). He also explained that Claimant has not been unable to come to terms with his physical limitations, and that he reacts with anger and depression. (CX 1, V1, T1, p. 67). I find that Claimant's work-related accidents could have caused his psychological impairment. Therefore, I find that Claimant has established a *prima facie* case and that the Section 20(a) presumption has been invoked.

The burden now shifts to the employer to produce countervailing evidence to rebut the Section 20(a) presumption. Dr. Milowe testified that Claimant's psychological impairment is not work-related, but rather is a lifelong condition. (TR 455). Dr. Milowe noted that Claimant has a history of angry attitude, depressed mood, immaturity and impulsivity, and that he has a low frustration tolerance. (TR 453-454, 461). Further, Dr. Zislis' office notes, Claimant's first

[32] Because I find that Claimant's back injury is not work-related, Issues 2, 3, 4, 5, 6, and 12 are moot. *See supra*, pp. 4-5.

treating physician, indicate that Claimant reported a lifelong history of dysphoric mood and quick temper and that he has had episodes of yelling/rage. (EX 1,V6, T3, p. 4). Dr. Zislis' notes buttress Dr. Milowe's finding that Claimant's psychological impairment is a lifelong condition. I find that the foregoing evidence severs the causal relationship between Claimant's employment and his psychological impairment. Therefore, Employer has rebutted the Section 20(a) presumption.

Once the Section 20(a) presumption has been rebutted, it falls out of the case and all the evidence must be weighed together to resolve the case. Drs. Schwarz and Milowe are the only psychiatrists who offer opinions regarding Claimant's psychological impairment in this case. Dr. Schwarz has been treating Claimant for about two and one-half years whereas Dr. Milowe evaluated Claimant one time in 2001. Both psychiatrists diagnosed Claimant with an adjustment disorder, yet they disagreed as to the etiology of that disorder. Dr. Schwarz attributed Claimant's adjustment disorder to his work-related injuries because Claimant's pain and inability to perform his former job have left him angry and depressed. In contrast, Dr. Milowe found that Claimant's adjustment disorder is a lifelong condition because of Claimant's reported history of anger, violence, immaturity, and impulsivity. Interestingly, Claimant gave different histories to Drs. Schwarz and Milowe. Claimant reported to Dr. Milowe that he had a violent past, road rage, and fantasized of harming the people responsible for his current situation without fear of imprisonment. (EX 1, V6, T5, p. 2). Claimant did not report to Dr. Schwarz that he had anger problems in the past, but rather reported that he was happy before his work-related injuries. (CX1, V1, T1, p. 70). Claimant testified that he got into several fights as a child and that he has been charged with assault three or four times. (TR 233; EX 1, V5, T3, p. 53). Claimant's testimony contradicts Dr. Schwarz's starting assumption that Claimant was not angry or violent before his work-related injuries. This adversely affects Dr. Schwarz's opinion, as he cannot opine as to the cause of Claimant's psychological impairment if he does not have a complete understanding of Claimant's background. Therefore, I find that Dr. Schwarz's opinion is entitled to little weight. In contrast, Claimant's testimony supports Dr. Milowe's account that Claimant has a violent background. I find that Dr. Milowe's opinion is well-reasoned and supported by the evidence in the record, and thus it is accorded great weight. After weighing all of the evidence, I find that Claimant's psychological impairment is not work-related, and thus it is not a compensable injury.

Nature of Disability

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 170, 23 BRBS 78 (CRT)(2d Cir. 1990); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). A condition is permanent if the claimant is no longer undergoing treatment with a view towards improving his condition or if his condition has stabilized. *Leech v. Service Engineering Co.*, 15 BRBS 18, 21 (1982); *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446, 447 (1981). It is undisputed that Claimant suffers from a permanent disability. *See Claimant's Closing Brief*, p. 13; *Employer's Closing Brief*, p. 55.

Extent of Disability

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 342-43 (1988). Where it is uncontroverted that the claimant cannot return to his usual work, he has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 96 (1991), *aff'd mem.sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). At the hearing, Employer stated that it "has accepted the right shoulder injury of May 1, 1998 and [it] has accepted the fact that Claimant cannot return to work in his former capacity as a trailer mechanic." (TR 12). Therefore, it is presumed that Claimant is totally disabled.

Suitable Alternate Employment

Once the claimant establishes a *prima facie* case of total disability, the burden shifts to the employer to establish suitable alternate employment. An employer must show the existence of realistically available job opportunities within the geographic area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Trans-State Dredging v. Benefits Review Bd. [Tarner]*, 731 F.2d 199, 201 (4th Cir. 1984); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042 (5th Cir. 1981). The employer is not required to act as an employment agency for the claimant. It must, however, prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. *Turner*, 661 F.2d at 1041-1042. The administrative law judge may rely on the testimony of vocational counselors that specific job opportunities exist to establish the existence of suitable jobs. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 (1985). The vocational counselor must identify specific available jobs; job surveys are not enough. *Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380, 384 (1983).

Based on the medical evidence regarding Claimant's left shoulder, right shoulder, and right thumb work-related injuries, Claimant is subject to the following work restrictions: no repetitive overhead lifting, intermittent lifting up to fifty pounds for six hours a day, and intermittent climbing for four hours a day. (EX 1, V5, T4, pp. 20-21, 34-35).

Claimant presented the vocational report and testimony of Ms. Delman to establish that no suitable alternate employment exists for Claimant. Ms. Delman performed several tests and determined that Claimant's math and reading skills are below the sixth grade level and that he has a low average level of intelligence. Also, she performed a transferable skills analysis and found no job matches. Ms. Delman concluded that Claimant could not return to the open labor market. (CX 1, V1, T2, pp. 9-10). First, a transferable skills analysis is based on an individual's skills from previous employment. Employer acknowledges that Claimant cannot perform his previous job, but argues that jobs exist which Claimant can perform. It is not clear from Ms. Delman's report and testimony whether she looked at non-heavy skilled jobs (the classification of the trailer mechanic position) before concluding that Claimant cannot return to the open labor

market. Second, Ms. Delman considered Claimant's back and psychiatric conditions when she determined that Claimant cannot return to the open labor market. Because I found Claimant's back and psychiatric conditions not to be work-related injuries, his symptoms and work restrictions from these conditions are not relevant to the inquiry of suitable alternate employment. Moreover, Ms. Delman testified that she did not consider whether Claimant was capable of any employment without the back injury. (TR 413). Therefore, I find that Ms. Delman's report and testimony do not establish that no suitable alternate employment exists.

Employer presented labor market surveys and the testimony of Mr. Bilski to establish the availability of suitable alternate employment. Before I discuss the contents of the labor market surveys, I must first address Claimant's criticisms of Mr. Bilski. First, Claimant criticized Mr. Bilski's labor market surveys because they did not include Claimant's back and psychiatric conditions and restrictions. *See Claimant's Closing Brief*, pp. 13-14. I previously found that Claimant's back and psychiatric conditions are not work-related, and thus their exclusion from the labor market surveys is not fatal. Second, Claimant criticized the labor market surveys because they reported inaccurate educational and work histories. *Id.* at 14. Mr. Bilski indicated in the surveys that he was unable to interview Claimant, and so he relied on Claimant's Crowley employment application to construct the background portion of the surveys. Claimant reported on the application that he had completed the twelfth grade, attended Carrier Corporation welding school, and worked at International Warehouse Services for two years. (EX1, V3, T1, pp. 12-13). Thus, any inaccuracies reported in the labor market surveys are due solely to Claimant's reported educational and work histories. Third, Claimant criticized the labor market surveys because Mr. Bilski failed to summarize Claimant's right shoulder injury, right thumb impairment, and twenty-five pound lifting restriction. *Id.* at 14-15. While Mr. Bilski did not thoroughly discuss the medical evidence regarding Claimant's right shoulder and right thumb injuries, he did mention Claimant's surgeries and stated that the identified jobs comply with the physical restrictions enunciated by the physicians. Moreover, Mr. Bilski identified jobs that complied with the twenty-five pound lifting restriction and in fact stated that he was identifying "light duty jobs," which entailed lifting no more than twenty pounds. (EX 1, V6, T1, pp. 70, 111, 134). I find that Mr. Bilski's labor market surveys are not fatally flawed, and thus can be relied upon by Employer to demonstrate suitable alternate employment.

Mr. Bilski identified seventy-five positions.[33] In order to assist in my discussion of these positions, I have classified them into nine different categories: service writer, unarmed security officer, telephone customer service/sales representative, retail sales/front desk, cashier/counter worker, warehouse/inventory, welder/solderer, supervisor, and miscellaneous positions. Mr. Bilski identified ten service writer positions. A service writer is required to prepare service estimates and actual billings for services required; this position does not require lifting more than ten pounds. Claimant testified that he contacted several of these employers, but was repeatedly told that experience as a service writer or in sales is needed in order to become a service writer. Ms. Delman also testified that she randomly contacted several of the listed employers and was informed that experience and computer skills are prerequisites for a service writerposition . Further, Mr. Bilski acknowledged that experience is needed for a service writer position. It is

[33] The four positions contained in Mr. Bilski's letter dated February 2, 2003 are not considered as that letter is not part of the record.

clear from the testimonial evidence that the service writer position requires prior experience. As Claimant has no experience as a service writer, I find that Claimant is not qualified for this position. Therefore, the identified service writer positions are not suitable alternate employment.

Mr. Bilski identified three unarmed security guard positions. These positions require a Class D unarmed security officer license. Employer offered to pay for Claimant to take the requisite class in order to obtain a Class D license, but Claimant refused because he felt that his criminal history would preclude his ability to get licensed. Mr. Bilski testified that he contacted the appropriate licensing agency in Tallahassee and was informed that an individual could obtain a Class D license so long as he did not have three DUIs within the past ten years or a withheld adjudication of guilt within the past three years. While Claimant testified that he had five or six DUIs, he did not pinpoint specific dates for when his DUIs occurred. The only evidence as to Claimant's criminal record is an adjudication of guilt to a possession of cocaine charge that was withheld in 1986. I find that there is no evidence that Claimant could not obtain a Class D license. The identified unarmed security officer positions do not require lifting more than ten pounds and appear to be sedentary work (sitting and/or driving). I find that these positions conform to Claimant's physical restrictions. Moreover, Claimant's age, education, and work experience do not inhibit his ability to perform these positions. However, the position with Weisser Security is almost forty miles from Claimant's house. I find that this position is not within Claimant's geographic area.[34] I find that the unarmed security guard positions with G&C Security and Galt Ocean Club constitute suitable alternate employment.

Mr. Bilski identified thirteen positions as a telephone customer service/sales representative. These positions do not require lifting more than five pounds, thus complying with Claimant's physical restrictions. The positions with Interactive Response and Market USA are more than twenty-five miles from Claimant's residence, and thus I find they are not within Claimant's geographic area. Moreover, Craft-Matic Inc. and TMI Communications could not be located in the online map or telephone book searches, and therefore it cannot be established whether these employers are located with Claimant's geographic area. The remaining positions involve handling inbound calls at a call center (troubleshooting problems and documenting telephone calls) and selling various products to residential and commercial customers. Claimant's only experience in sales or customer service was when he had his own welding company, which failed because his customer relations "left something to be desired." (TR 165). Moreover, Drs. Milowe and Schwarz testified that Claimant has a low frustration tolerance. While I found that Claimant's psychological impairment is not work-related, its existence is relevant to his employability. I find thatClaimant's previous failure in a customer serv ice position coupled with his low frustration tolerance establish that these positions are not suitable alternate employment.

The labor market surveys identified fifteen retail sales/front desk positions. These positions involve selling products, handling customer needs, and processing sales, and do not require lifting more than five pounds. The positions with Parrot Jungle, Caribbean Transport, Book Liquidators, and Freight Savers Express are more than twenty-five miles from Claimant's

[34] In order to determine the location of the identified positions in relation to Claimant's residence, I have consulted www.mapquest.com. Employer instructed Mr. Bilski to locate jobs within twenty-five miles of Claimant's residence, which I adopt as his geographic area.

residence and thus are not within his geographic area. The positions with Cornerstone America, Ft. Lauderdale Lincoln Mercury, National Diamond, Rick Case Acura, Lauderdale Imports Ltd., and Daewoo Motor America are strictly sales positions. Claimant has no experience in sales, and while the labor market surveys indicate that several of the employers offer full training, I find that these positions are not realistic opportunities for Claimant, based on his education, work experience, and low frustration tolerance. Further, I find Claimant credible when he testified that experience was necessary for the sales position with Copyco, Inc. Claimant has not presented any evidence that he cannot perform the basic responsibilities of the remaining positions. (I find that Claimant's poor attitude about earning less money does not establish that he is unqualified). I find that Claimant is qualified for the positions with Steinmart, TJ Maxx, Ed Morse Honda, Marriott Fairfield Inn, and Sears Portrait Studio based on his age, education, work experience, and physical restrictions, and therefore I find that these positions are suitable alternate employment.

Mr. Bilski identified nine cashier/counter worker positions. The positions with Florida Gaming Center and Laurenzo's Oceanside are more than twenty-five miles from Claimant's residence, and therefore I find that they are not within his geographic area. The remaining positions require the employee to take customers' orders, attend to cash register purchases, and answer customer questions. These positions require interaction with the public, but I find that Claimant's low frustration tolerance will not interfere with his ability to perform these jobs because he will be providing a service to the customers, rather than trying to sell them a product, and thus should not elicit the same level of stress and frustration as strictly sales positions. In particular, I find that the positions with Cam Auto Imports and Chevron are suitable for Claimant given his interest in automobiles and mechanics. The lifting restrictions varied by position, but no position required lifting more than twenty pounds. Based on Claimant's education, work experience, and physical restrictions, I find that the remaining seven positions constitute suitable alternate employment.

Mr. Bilski identified five warehouse/inventory positions. The position with Minolta Business Solutions is more than twenty-five miles from Claimant's residence, and thus is not within his geographic area. Mr. Bilski identified a warehouse helper position and described it as follows: "the successfull [sic] candidate will be responsible for assisting with warehouse responsibilities including operation of forklift." (EX 1, V6, T1, p. 162). There is no indication of the lifting restriction for this position. The description of this position is vague, and I cannot determine whether Claimant could perform this job based on his physical restrictions. I find that this position does not qualify as suitable alternate employment. The remaining three positions were as a purchasing agent, a merchandiser, and in shipping and receiving. These positions include maintaining inventory, rotating products, and organizing paperwork. The purchasing agent and merchandiser positions do not require lifting more than ten pounds, and the shipping and receiving position does not require lifting more than thirty pounds. Claimant previously prepared and organized paperwork at his jobs with Hoover Irrigation and Employer. Claimant testified that he contacted the employer about the shipping and receiving position, but was told that he needed experience. I credit Claimant's testimony that this position requires experience. At the hearing, Mr. Bilski testified that the purchasing agent position might be over Claimant's head, but he wanted Claimant to apply to the position based on Claimant's previous experience owning and running a small business. (TR 150-151). I find that this position is not suitable

alternate employment for Claimant based on his low frustration tolerance coupled with Mr. Bilski's acknowledgement that this position is not suitable for Claimant. I find thatClaimant could perform the merchandiser position, based on his age, education, work experience, and physical restrictions. Therefore, I find that this position constitutes suitable alternate employment.

Mr. Bilski identified one soldering and four welding positions. Two of the positions, the soldering position with ACR Electronics and a welding position with Ironclade Welding, are more than twenty-five miles from Claimant's residence and thus are not within his geographic area. The other three positions involve welding fencing, aluminum, and wrought iron furniture. Claimant's experience demonstrates that he could perform these positions, as he worked as a welder for Hoover Irrigation, Bootleg Trailer, and Employer. The labor market surveys indicate that these positions do not require lifting more than twenty pounds. Claimant testified that he contacted Prezant Iron Works and was informed that the lifting requirement was one hundred pounds, not twenty pounds. Moreover, Claimant testified that welding is heavy work, and that if he could still weld, he would be working for Employer. Mr. Bilski considered the welding positions suitable employment for Claimant because Dr. Kessler had approved them. While Dr. Kessler approved of the welding positions, he only treated Claimant for his shoulder injuries, not his thumb injury. Claimant testified that he has difficulty holding objects, and often drops them, because of his thumb injury. I find that Claimant cannot perform the welding positions based on his physical limitations, and therefore these positions are not suitable alternate employment.

The labor market surveys identify two supervisory positions. The first position is as a fleet supervisor and requires scheduling and monitoring maintenance programs for all company vehicles, maintaining a parts inventory, facilitating safety training, and insuring OSHA compliance. The second position is as a production line supervisor and requires supervising the bottle production line, operation of production equipment, computers, and machinery utilized in the bottling process. Claimant testified that he did not apply for these positions because he gathered from the automated message that he needed two to three years of supervisory experience and a chauffeur's license, neither of which he had. Further, Mr. Bilski acknowledged that Claimant was not "per se" qualified, but still wanted him to submit an application. (TR 85). Claimant has some experience as a supervisor – he worked as a foreman at Hoover Irrigation and he was an informal crew chief when he raced cars. However, Claimant testified that he was fired from Hoover Irrigation after a few months because he did not get along with the crew and he did not get along with the other race car crew members. I find that Claimant is not qualified for the supervisory positions based on his prior experience, and thus these positions are not suitable alternate employment.

Mr. Bilski identified thirteen additional jobs which cannot be classified into the above categories. These positions are: dispatch trainee, night audit clerk, floor waxer, sewing equipment operator, water meter reader, appointment setter, floating monitor, order picker/packer, usher, primer, route driver, material cutter, and processor/sorter. The dispatch trainee, night audit clerk, and floor waxer positions are more than twenty-five miles from Claimant's residence, and thus are not within his geographic area. Claimant submitted a letter from Mr. Robert Rocke, president of BoAir Inc., stating that Claimant is not qualified for the sewing equipment operator position nor is there an open position with his company. (EX 1, V5,

T3, p. 164). Also, Dr. Kessler did not approve of the sewing equipment operator position. I find that the sewing equipment operator position is not suitable alternate employment. Claimant credibly testified that he contacted the employer regarding the water meter reader position and was informed that the position involved lifting up to fifty pounds. I find that this position does not comply with Claimant's lifting restrictions, and thus it is not suitable alternate employment. The labor market survey does not state the lifting requirements for the primer and route driver positions, and thus I cannot determine whether these positions comply with Claimant's physical restrictions. The material cutter and processor/sorter positions do not require "frequent lifting in excess of thirty pounds." (EX 1, V6, T1, p. 2). The labor market survey is vague as to how frequently thirty pounds would have to be lifted, and thus I cannot determine whether these positions comply with Claimant's lifting restriction. The lifting requirement for the appointment setter, floating monitor, order picker/packer, and usher positions is twenty-five pounds or less, and Claimant has not presented any evidence that he is not physically able or qualified to perform these positions. I find that the appointment setter, floating monitor, order picker/packer, and usher positions are suitable alternate employment based on Claimant's age, education, work experience, and physical restrictions.

In sum, I find that the following positions constitute suitable alternate employment: unarmed security officer, retail sales/front desk, cashier/counter worker, merchandiser, appointment setter, floating monitor, order picker/packer, and usher.

Once the employer demonstrates suitable alternate employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. *Turner*, 661 F.2d at 1043; *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258, 260 (1988). If the claimant does not prove such, at most his disability is partial, not total. 33 U.S.C. § 908(c); *Southern v. Farmers Export Co.*, 17 BRBS 64, 67 (1985). For a majority of the positions identified in the labor market surveys, Claimant did not apply in-person, but rather he merely telephoned the employers to inquire about the position. He was usually told not to apply for the position once the employers heard about his numerous injuries and medical conditions. Claimant testified that he did not pursue the unarmed security guard positions because he believed that he could not obtain a Class D license (based on a criminal history not included in the record). He also testified that he did not pursue any of the positions identified in Mr. Bilski's February and March 2003 letters because they arrived late and he felt that he was being harassed. Claimant expressed an interest in a nonphysical job with Employer because it paid sixty thousand dollars a year and Dr. Milowe reported that Claimant wanted to operate a small business. Dr. Schwarz explained that Claimant did not want any of the positions identified in the labor market surveys because he would have to take a cut in pay, which would be a significant blow to his ego. Claimant has demonstrated that he is unwilling to entertain any position which pays less than his former job with Employer. I find that Claimant has not diligently searched for alternate employment nor is he willing to work at a position that pays less than he earned with Employer. Therefore, I find that Claimant is permanently partially disabled.

Total disability becomes partial on the earliest date that the employer establishes suitable alternate employment. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*,25 BRBS 128, 131 (1991). From the date of maximum

medical improvement to the date suitable alternate employment is shown, the claimant's disability is total. *Stevens,* 909 F.2d at 1259. Nevertheless, an employer is not prevented from attempting to establish the existence of suitable alternate employment as of the date of an injured employee reaches maximum medical improvement or from retroactively establishing that suitable alternate employment existed on the date of maximum medical improvement. *Rinaldi,* 25 BRBS at 131; *Newport News Shipbuilding &Dry Dock Co. v. Tann,* 841 F.2d 540, 543 (4th Cir. 1988).

Claimant was able to perform his previous job after his left shoulder injury without any wage loss, demonstrating that he was not totally disabled at that time. Claimant returned to work after the right shoulder injury, but he did not perform his previous job as a trailer mechanic. Rather, he worked as an electrical mechanic as part of the Early Return to Work Program. Claimant worked under this Program for about five months, and then left Crowley and has not worked since. Dr. Kessler found that Claimant reached MMI for his right shoulder injury on February 26, 1999. I find that Employer has established the existence of suitable alternate employment as of November 18, 2001, that date of the first labor market survey. Therefore, I find that Claimant was permanently totally disabled from February 26, 1999 to November 17, 2001, and that he was permanently partially disabled from November 18, 2001 to the present and continuing.

Wage-Earning Capacity

Section 8(c)(21) provides that in unscheduled permanent partial disability cases, "compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability." "Wage-earning capacity" refers to "an injured employee's ability to command regular income as the result of his personal labor." *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405 (1989)(citation omitted). Post-injury wage-earning capacity is set by Section 8(h) at the claimant's actual post-injury earnings, if fair and reasonable; if not, the administrative law judge must fix a fair and reasonable wage earning capacity pursuant to the factors listed in Section 8(h) and pertinent cases. *See generally Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The claimant's physical condition, age, education, industrial history, availability of employment, earning power on the open market, continuity and stability of the claimant's post-injury work, and whether medical and other circumstances indicate a probable future wage loss due to the work-related injury are factors to be considered when conducting the inquiry into the claimant's wage-earning capacity. *See Devillier,* 10 BRBS at 651, 661; *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 153 (1988). When a claimant has a physical impairment from the injury but is doing his usual work adequately, regularly, full-time, and without due help, it is proper to find that the employee's wages fairly represent his wage-earning capacity, and that the claimant has suffered no loss and therefore is not disabled. *See* § 908(h); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984). Where a claimant seeks benefits for total disability and the employer establishes suitable alternate employment, the earnings established for the alternate employment show the claimant's wage-earning capacity. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The parties stipulated that Claimant's average weekly wage at the time of his right shoulder injury was $1,055.33. Claimant is not currently employed, and thus he does not have any post-injury wages. I previously determined that Employer established the existence of suitable alternate employment as of November 18, 2001, which can be used to determine Claimant post-injury wage-earning capacity. The starting wages of thirteen jobs range from $6.00 - $9.75 an hour, and the starting wages of the other six identified jobs are not listed in the labor market surveys. Claimant does not have experience for any of the jobs that I identified as suitable alternate employment, and Employer did not proffer any evidence that Claimant would earn more than the lowest starting wages. Moreover, each time a starting wage range was listed for a position in the labor market surveys, Mr. Bilski stated that the starting wage was "contingent upon the candidate's qualifications in addition to benefits and advancement opportunities." (EX 1, V6, T1, pp. 72-80, 114-117). I find that Claimant would not qualify for more than the lowest starting wages, which range from $6.00 to $8.50 an hour. I find that $7.42 an hour is the average starting wage. Mr. Bilski testified that the starting wage for entry level positions was about one dollar less in 1998. Therefore, I find that the average starting wage in 1998 was $6.42 an hour. Dr. Kessler, the physician who imposed work restrictions on Claimant, limited Claimant's lifting and climbing, but otherwise stated that Claimant could sit, walk, bend, squat, kneel, twist, and stand for eight hours a day. (EX 1, V5, T4, pp. 20-21, 34). Therefore, I find that Claimant can work full-time, forty hours a week, and that his post-injury wage-earning capacity is $256.80 a week ($6.42/ hour × 40 hours = $256.80).

Credit to Employer

Section 14(j) of the Act allows the employer a credit for its prior payments of compensation against any compensation subsequently found due. *Balzer v. General Dynamics Corp.*, 22 BRBS 447, 451 (1989), *aff'd on reconsideration*, 23 BRBS 241 (1990); *Mijangos v. Avondale Shipyards*, 19 BRBS 15, 21 (1986), *rev'd on other grounds*, 948 F.2d 941 (5th Cir. 1991). If an employer pays benefits and intends them as advance payments of compensation, the employer is entitled to a credit under Section 14(j). *Id.*; *see also Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 317 (5th Cir. 1997). I find that Employer is entitled to a credit in the amount of its prior compensation payments.

Medical Costs

Under Section 7 of the Act, a claimant who establishes entitlement to benefits is also entitled to reasonable and necessary medical expenses. 33 U.S.C. § 907(a); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Because Claimant is entitled to permanent partial disability compensation for his work-related injuries, I find that Claimant is entitled to reasonable and necessary future medical expenses arising from his work-related injuries and is to be reimbursed for the costs that he has already incurred. Such compensation shall continue for so long as Claimant's injuries require. 20 C.F.R. § 702.402.

Penalties and Interest

Failure to begin compensation payments or to file a notice of controversion within twenty-eight days of knowledge of the injury or the date the employer should have been aware of

a potential controversy or dispute renders the employer liable for an assessment equal to ten percent of the overdue compensation. The first installment of compensation becomes due on the fourteenth day after the employer has been notified pursuant to Section 12(d), 33 U.S.C. 912(d), or after the employer has knowledge of the injury. 33 U.S.C. § 914(b); *Universal Terminal and Stevedoring Corp. v. Parker*, 587 F.2d 608 (3d Cir. 1978). Section 14(d) sets forth the procedure for controverting the right to compensation, and it provides that an employer must file a notice of controversion on or before the fourteenth day after it has received notice pursuant to section 12(d) or after it has knowledge of injury. 33 U.S.C. § 914(d); *see also Spencer v. Baker Agricultural Co.*, 16 BRBS 205, 209 (1984). The determination of whether an employer has knowledge of the injury is a question of fact and is assessed in the same manner as determining knowledge under section 12(d). *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 168 (1989).

The parties stipulated that Employer began paying benefits to Claimant for his left shoulder, right shoulder, and right thumb injuries within one day of receiving notice of the injuries from Claimant. Because Employer began payments within fourteen days of notice, I find that Claimant is not entitled to a penalty award.

The Act does not explicitly provide for the payment of interest, but it is an accepted practice to assess interest on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724, 725 (1978). The appropriate rate of interest is the rate assessed by the United States District Courts pursuant to 28 U.S.C. § 1961. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 270 (1984). Claimant is awarded interest on all unpaid compensation, to be assessed beginning as of the date on which such payments were due and ending on the date of actual payment.

Section 8(f) Relief[35]

To avail itself of Section 8(f) relief where the claimant suffers from a permanent partial disability, an employer must establish: (1) that the claimant had a pre-existing permanent partial disability; (2) that the pre-existing disability was manifest to the employer prior to the work-related injury; and (3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuildi*ng & *Dry Dock Co.[Carmines]*, 138 F.3d 134, 32 BRBS 48, 50 (CRT)(4th Cir. 1998); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990). The employer bears the burden of proof on each element for Section 8(f) relief. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 14 BRBS 716, 724 (CRT)(4th Cir. 1982).

In its brief, Employer argues that if Claimant is found to have a work-related back injury and it is determined that he is permanently and totally disabled, then Claimant's disability "is not due solely to the injury of July 1, 1999, [but r]ather Claimant's present disability is a combined

[35] Employer raised Section 8(f) when the case was before the district director, but the district director determined that it had been raised prematurely because it had not been established that Claimant had reached maximum medical improvement. Employer's right to later seek relief under Section 8(f) was preserved.

result of his April 6, 1995 left shoulder injury, his October 21, 1996 thumb injury, his May 8, 1998 right shoulder injury, and his pre-existing back injuries." *Employer/Carrier's Closing Brief* p. 34. Employer focuses it s Section 8(f) argument on whether Claimant's disability from his back injury is solely work-related. However, I previously found that Claimant's back injury is not work-related, and thus that injury cannot be the basis for an award of Section 8(f) relief. Moreover, Employer has not provided any evidence that Claimant's pre-existing back condition (*assuming arguendo* that it amounted to a "permanently partial disability") materially and substantially contributed to his left shoulder, right shoulder, and right thumb injuries, so that his current level of disability is greater than would have resulted from the work-related injuries alone. The physicians focused narrowly on the injury for which they treated Claimant, and they did not offer opinions as to whether Claimant's other injuries could be contributing to his disability. I find that Employer cannot establish that Claimant's permanent partial disability is not due solely to his work-related injuries, and therefore its request for Section 8(f) relief is denied.

ORDER

IT IS ORDERED THAT:

1. Employer shall pay Claimant permanent total disability compensation from February 26, 1999 to November 17, 2001 at the weekly compensation rate of $703.55 plus any applicable adjustments provided in Section 10(f) of the Act.

2. Employer shall pay Claimant permanent partial disability compensation from November 18, 2001 to the present and continuing in the amount of $532.35 ($1055.33 - $256.80 = $798.53 × 66 2/3% = $532.35) per week.

3. Employer shall receive a credit for any compensation previously paid to Claimant pursuant to Section 14(j) of the Act.

4. Employer shall reimburse Claimant for medical costs he has already incurred in relation to hiswork -related injuries and shall provide all medical care that may in the future be reasonable and necessary for the treatment of his work-related injuries.

5. Employer shall pay interest on each unpaid installment of compensation at the rate specified in 28 U.S.C. § 1961, computed from the date that each payment was due until the date of actual payment.

6. The District Director shall make all calculations necessary to carry out this Order.

7. Claimant must petition for attorney fees and costs within 30 days after service of this Decision and Order. The petition must be prepared on a line item basis and comply with 20 C.F.R. § 702.132. Employer may object within 10 days after receiving the petition. Objections must be noted and explained on a line item basis, or the items will be deemed acceptable and allowed. Claimant may file a line item reply within 10 days after receiving any objections.

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DANIEL L. LELAND
Administrative Law Judge